

UNITED STATES OF AMERICA 94 FERC ¶ 61,273
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Curt Hébert, Jr., Chairman;
William L. Massey, and Linda Breathitt.

Carolina Power & Light Company Docket No. RT01-74-000
Duke Energy Corporation
South Carolina Electric & Gas Company
GridSouth Transco, LLC

ORDER PROVISIONALLY GRANTING RTO STATUS

(Issued March 14, 2001)

On October 16, 2000, Carolina Power & Light Company (CPL), Duke Energy Corporation (Duke) and South Carolina Electric & Gas Company (SCE&G) (referred to collectively as the Applicants or initial members) submitted a compliance filing to comply with Order No. 2000.¹ In their filing, the Applicants request authorization and approval to establish GridSouth Transco, LLC (GridSouth) as a Regional Transmission Organization (RTO). In this Order, we accept the Applicants' filing and find that their proposal, as modified in this order, will create a viable, stand-alone transmission business that complies with Order No. 2000.

I. Background

In Order No. 2000, the Commission recognized that there continue to be important transmission-related impediments to a competitive wholesale electric market. These impediments included the engineering and economic inefficiencies inherent in the current operation and expansion of the transmission grid and the continuing opportunities for transmission owners to unduly discriminate in the operation of their transmission systems so as to favor their own or their affiliates' power marketing activities.² The engineering and economic inefficiencies the Commission identified and sought to address in Order No. 2000 resulted from the lack of regional coordination of an

¹Regional Transmission Organizations, 65 FR 809 (January 6, 2000), FERC Stats. & Regs. ¶ 31,089 (1999), order on reh'g, Order No. 2000-A, 65 FR 12,088 (March 8, 2000), FERC Stats. & Regs. ¶ 31,092 (2000), petitions for review pending sub nom., Public Utility District No. 1 of Snohomish County, Washington v. FERC, Nos. 00-1174, et al. (D.C. Cir.).

²Id., FERC Stats. & Regs. ¶ 31,089 at 31,003.

interconnected transmission grid.³ The Commission concluded that a properly structured RTO could provide significant benefits in the operation of the transmission grid and effectively remove existing impediments to competition in the power markets. A successful RTO would, through transmission grid management, improve grid reliability, remove remaining opportunities for discriminatory transmission practices, improve market performance, and facilitate lighter handed regulation.⁴ These efficiencies would include, among other things, regional transmission pricing, improved congestion management of the grid, more accurate total transmission capability (TTC) and available transmission capability (ATC) calculations, more effective management of parallel path flows, reduced transaction costs, and facilitation of state retail access programs.⁵

In order for an RTO to adequately address regional operational and reliability issues and to remove opportunities for undue discrimination, the Commission stated in Order No. 2000 that, at a minimum, an RTO must satisfy four characteristics: independence, scope and regional configuration, operational authority and short-term reliability. In addition, the RTO would be required to perform eight functions: tariff administration and design, congestion management, parallel path flow, ancillary services, OASIS and TTC and ATC, market monitoring, planning and expansion and interregional coordination.⁶

In their October 16, 2000 filing, the GridSouth Applicants request the Commission's approval for the formation of an independent, for-profit transmission company or "transco." GridSouth submitted a GridSouth Open Access Transmission Tariff (Tariff or OATT), pursuant to which GridSouth will provide open access transmission and ancillary services. The compliance filing includes a GridSouth Transmission Operating Agreement (TOA), pursuant to which the Applicants will transfer functional control of their transmission facilities to GridSouth. The Applicants also tendered a Limited Liability Company Agreement of GridSouth Transco, LLC (LLC Agreement) that will establish GridSouth as a limited liability company under Delaware law, and includes the governance provisions for the proposed RTO. The Applicants represent that, together, these agreements when executed will create an RTO as envisioned by the Commission in Order No. 2000.

³Id. at 31,004.

⁴Id. at 31,017.

⁵Id. at note 99.

⁶Id. at 30,993-94.

Under the Applicant's proposal, customers of GridSouth will not pay pancaked transmission access charges. Rather, the proposed OATT will specify a single access charge for transmission service over the facilities subject to GridSouth's functional control. The Applicants propose three pricing zones, and that a transmission customer delivering power to a load located within a pricing zone pay a "license plate" rate. Point-to-point transmission service customers that take service through or out of GridSouth will pay a single rate based on the weighted average of the established zones. The Applicants state that they plan to supplement their filing to complete their pricing proposal, which will include incentive rates for new transmission construction.⁷

The Applicants state that, after several preliminary meetings, in May 2000, they executed a letter of intent to negotiate the terms of a for-profit, transco model RTO. Shortly afterward, the Applicants publicly announced their intentions to develop the GridSouth RTO. According to the filing, by August 2000, the Applicants had developed "strawman" documents, which were made available for stakeholder review and comment. The Applicants state that they created a webpage to post documents, respond to questions, and inform stakeholders of upcoming meetings. During August and September 2000, the Applicants held five stakeholder meetings, and additional meetings with individual stakeholders. The Applicants represent that the documents submitted with their compliance filing reflect significant modifications resulting from the collaborative process with stakeholders.

The Applicants seek approval from the Commission to allow GridSouth to exercise functional control over their transmission facilities, subject to the governance structure stated in the LLC Agreement. They also request that, pursuant to section 205 of the Federal Power Act (FPA), 16 U.S.C. § 824d (1994), the Commission accept for filing the unexecuted forms of the TOA, LLC Agreement and OATT. They request approval under section 203 of the FPA for the disposition of facilities, if deemed necessary by the Commission. Further, the Applicants request a finding that their Application meets the requirements of Order No. 2000 and that GridSouth qualifies as an RTO.

The Applicants state that, if they obtain timely regulatory approval of their filing, GridSouth could be ready to assume functional control of the transmission facilities on December 15, 2001, which they refer to as the "independence date."

⁷As of the date of this order, the Applicants have not submitted the supplemental filing.

For the reasons discussed below, the Commission finds that the Applicants' compliance filing, modified as discussed in this order, complies with the minimum RTO characteristics and functions described in Order No. 2000, accepts the unexecuted TOA, LLC Agreement and OATT, and provisionally grants RTO status to GridSouth.

II. Discussion

A. Procedural Matters

Notice of the filing was published in the Federal Register, 65 Fed. Reg. 64,207 (2000), with comments, protests, and interventions due on or before November 20, 2000. The intervenors are listed on the Appendix. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,⁸ the state Commissions' notices of intervention and the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. The one motion to intervene out of time (CIGFUR) is granted pursuant to 18 C.F.R. § 385.214(d), since the Commission finds that granting intervention at this stage of the proceeding will not disrupt the proceeding or place an additional burden on existing parties.

Numerous intervenors filed comments and protests, as noted in the Appendix. On December 5, 2000, the GridSouth Applicants filed a response to the comments and protests. In a December 15, 2000 filing, SMI Steel argues that the Commission should reject the Applicants' response as an answer to an answer, which is not permitted under 18 C.F.R. § 385.213(a)(2) unless otherwise ordered by the decisional authority. We will accept the Applicants' response because it helps clarify the issues under consideration in this proceeding.

On November 17, 2000, EPMI filed a motion in four RT dockets, including the current proceeding, requesting that the Commission condition market rate authority on RTO participation. On December 4, 2000, the GridSouth Applicants filed an answer to EPMI's motion. EPMI essentially seeks a generic ruling that any transmission owner who does not participate in an RTO by the December 15, 2001 deadline should cease to benefit from any assumption that it has mitigated transmission market power and, thus, should be denied the privilege of selling power at market-based rates. The current docket is not the proper forum for seeking a generic ruling on this issue. Moreover, in Order No. 2000, EPMI and others raised this same issue and we declined to adopt such a

⁸18 C.F.R. § 385.214 (2000).

generic policy.⁹ We will not revisit the issue in this proceeding. Accordingly, we deny EPMI's motion.

On December 21, 2000, Electricities, New Horizon and Central filed a joint "Motion to Lodge" into this proceeding the comments submitted by Duke Energy North America, LLC, a subsidiary of Duke Energy Corporation (DENA) on November 20, 2000 in Docket No. RT01-2-000, relating to the RTO compliance filing of PJM Interconnection L.L.C. On January 5, 2001, the GridSouth Applicants and DENA filed separate answers to the joint motion. We reject the motion to lodge because DENA's comments regarding the proposed PJM RTO do not help clarify or provide any useful information regarding whether the GridSouth Applicants' compliance filing satisfies Order No. 2000.

B. RTO Characteristics

RTO Characteristic No. 1: Independence

The RTO must be independent of any market participant

1. The GridSouth Applicants' Proposal

The Applicants state that their proposal satisfies the Order No. 2000 Independence requirement. They propose a for-profit transco model in which functional control of the transmission owner's assets is transferred to GridSouth, and the transmission owners will retain only a passive ownership interest in the organization. The Applicants state that, pursuant to the LLC Agreement, the transmission owners will have rights to profit/loss distributions but will not retain any active ownership interest other than on a limited class of fundamental business decisions such as whether to dissolve the LLC. Other such fundamental decisions include whether to sell LLC assets, merge with another entity or engage in business not relating to the transmission of electric power.¹⁰ All other business decisions will be made by an independent Board of Directors (Board). According to the filing, while the GridSouth Board members owe a fiduciary duty to GridSouth and its members, it is outside of the scope of such duties for Board members to consider the interests of the passive owners outside GridSouth's transmission business.¹¹ The Applicants state that the Stakeholders Advisory Committee and the independent market

⁹Order No. 2000 at 31,032-34.

¹⁰Section 6.13(b) of the LLC Agreement lists the fundamental business matters.

¹¹See section 6.19 of the LLC Agreement.

monitor provide additional safeguards that market participants will not be able to exercise control over GridSouth's operations.

The Applicants state that, pursuant to the LLC Agreement, GridSouth will be governed by an independent Board, which will consist of seven members. The LLC Agreement provides that the Board members must have no affiliation with, or any direct financial interest in, any market participant.¹² While GridSouth may hire former employees of market participants, these employees must divest stock ownership and other financial ties with their former employers within six months of employment with GridSouth.¹³

The Applicants propose to use a search firm to identify Board candidates that meet the Commission's independence criteria.¹⁴ The Applicants state that they will select a nationally-recognized search firm to identify a list of qualified candidates to serve as Board members pursuant to criteria consistent with the Commission's independence requirements. They state that stakeholders, including the three GridSouth initial members (Duke, CP&L and SCE&G), may recommend specific candidates who meet such criteria. According to the Applicants, the initial members will have the opportunity to reduce the slate of candidates to no fewer than two candidates for each position. This slate will then be posted on the GridSouth website for stakeholder comment. The Applicants state that, after considering such input, the initial members will select a proposed Board and submit the proposal to the Commission for approval.

After the initial Board selection, existing Board members will fill vacancies when Board members resign or their terms expire. There is no limit on the number of terms that a Board member can serve, except that no member may be selected over the age of 75.

¹²GridSouth adopts the Commission's definition of Market Participant, provided at section 35.34(b)(2) of the Commission's regulations, 18 C.F.R. § 35.34(b)(2) (2000).

¹³Schedule F of the LLC Agreement provides the Standards of Conduct. Paragraph II.E of the Standards states that directors, agents, officers and employees of GridSouth shall not have a direct financial interest in, or stand to be financially benefitted by, any transaction with any member or market participant. The standards do not prohibit the indirect ownership of (1) securities through mutual funds that are not targeted toward the electric industry, provided that the director, agent, officer or employee does not control the sale or purchase of securities and (2) participation in a pension plan of a member or market participant if the member's or market participant's performance has no material effect on such pension plan.

¹⁴Schedule E of the LLC Agreement describes the initial Board selection process.

Board members can be removed for cause by Board members, and all stakeholders have the right to petition the Board for such removal. Alternatively, a super majority of GridSouth members, i.e., a combination of GridSouth members holding an aggregate passive ownership interest greater than 85%, may request a panel of independent arbitrators to remove any Board member for cause.

The Applicants propose to establish a Stakeholder Advisory Committee (SAC) that will consist of representatives from the following groups: (1) generation owners located in the GridSouth region; (2) non-generation owning brokers, marketers and aggregators; (3) transmission owners; and (4) municipalities, cooperatives, and other distribution companies.¹⁵ Each sector will be given 25% of the vote, and the SAC will have the right to present proposed Tariff changes to the Board if approved by a two-thirds vote. The Applicants will add a fifth category, consisting of retail customers in the service territory, after the "Rate Unbundling Date," i.e., when retail unbundling is implemented in the Carolinas. Stakeholders that seek to designate a representative to the SAC must pay an initial fee of \$10,000 and subsequent annual fees of \$5,000.

Further, section 2.03(b) of the TOA provides that GridSouth will have exclusive rights under section 205 of the FPA to propose changes to rates and terms of the Tariff. Section 203(b) obligates GridSouth to design rates under the Tariff that will enable it to pay each participant its TOA fee. This provision also requires GridSouth to consult with participants and consider their comments before proposing changes to the Tariff.

2. Intervenor Comments

a. Passive ownership

Santee Cooper and SC Consumer Advocate argue that the Applicants' proposal to retain a passive (i.e., non-voting) ownership interest in GridSouth is deficient and violates the independence principle. They argue generically that allowing market participants to maintain a passive ownership interest in an RTO runs a substantial risk of compromising the organization's independence.¹⁶ Moreover, Santee Cooper contends that the specific GridSouth proposal is flawed because, while Order No. 2000 concluded that passive ownership was acceptable to permit transmission owners to transfer transmission assets to a transco without triggering capital gains taxes since that would deter RTO formation, the

¹⁵See section 6.7 of the LLC Agreement.

¹⁶Santee Cooper acknowledges that it advocated against permitting passive ownership interests in the Order No. 2000 proceeding and that the Commission rejected Santee Cooper's position. See Order No. 2000 at 31,065.

GridSouth Applicants have indicated that no transfer of assets will occur until state-mandated utility restructuring and retail access are implemented. Santee Cooper argues that compromising the independence by allowing passive ownership interests in GridSouth is not justified since no transfer of assets is imminent or even on the horizon.

b. Passive owners' veto rights over fundamental business decisions

Santee Cooper, CUCA, Williams and Calpine contend that the Applicants have failed to adequately justify their retention of control over the specific "fundamental" business activities listed in section 6.13 of the LLC Agreement, which require approval of a super majority of the GridSouth members. They contend that the Applicants' explanation that the provision is necessary to protect the integrity of the members' capital investment in GridSouth is unsatisfactory because (1) there is no need to protect the Applicants' investment in the RTO until they transfer ownership of their transmission assets to GridSouth and (2) the proposed restrictions on independence require greater justification than a conclusory statement that they are essential to protect investment. They contend that, in Alliance Companies, 89 FERC ¶ 61,298 at 61,919-20 (2000), the Commission indicated that such restrictions would require specific justification, and argue that none is offered here by the GridSouth Applicants.

c. Board selection and removal process

Numerous intervenors express concern about the initial GridSouth members' control over the Board selection process. They note that the initial members will select the search firm that identifies the list of candidates, establish the selection criteria, recommend candidates, reduce the slate of candidates to two individuals for each slot, and select the Board after stakeholder input. They protest that the initial members' control over the outcome - by exercising control over each stage of the selection process - will jeopardize the independence of the Board. Intervenors argue that the Applicants' proposal is inconsistent with Entergy Services, Inc. (Entergy), in which the Commission concluded that Entergy's reliance on a stakeholder committee to select the Board was acceptable only "assuming the committee is fair and balanced and does not allow any one type of customer to veto particular candidates."¹⁷ Intervenors propose that market participants should have an opportunity to participate in the selection process.

Joint Protestors argue that the selection process is further flawed because the Applicants have not identified in their filing the specific criteria for candidate selection. They also contend that, while the proposed selection process requires that "two or three

¹⁷88 FERC ¶ 61,149 at 61,500-501 (1999).

candidates" in the reduced slate be from the non-profit sector of the electric power industry, there is no requirement that any Board members actually selected have prior experience in the non-profit electric power sector, in contradiction of the Applicants' assurance that the non-profit sector would be represented on the Board.

Joint Protestors object to the Applicants' proposal to submit the proposed slate of Board members to the Commission for approval, contending that the Commission is not designed or equipped to evaluate whether particular proposed Board members are fit for his or her office. They contend that, once the initial Board is selected through the "flawed" process, the potential bias in favor of the GridSouth members will be perpetuated by the proposed provisions that Board members can serve for an unlimited number of terms so long as they have not reached the age of 75, and that Board members choose new members.

Numerous intervenors protest that only GridSouth members may make a request for removal of Board members for cause, and contend that stakeholders should have the same right. They contend that Board members cannot appear to be impartial when they have former ties to the GridSouth members, and are aware that the members can remove them for cause. NC Attorney General argues that Board members cannot be truly independent if they are allowed to hold pension plans from the Applicants or hold mutual funds that include an Applicant's or market participant's stocks. Joint Protestors contend that, while these indirect holdings may be acceptable in some circumstances, they are not acceptable here because the initial members will choose the Board members pursuant to a flawed process.

d. Board of directors fiduciary duties

As mentioned above, section 6.19 of the LLC Agreement provides that the fiduciary duty owed by the Board to GridSouth and its members does not allow the directors and officers to consider the interests of the members outside GridSouth's transmission business. Dynegey questions whether this statement provides the "high degree of assurance that those who are not passive owners will have equal access to the services provided by the RTO."¹⁸ SC Consumer Advocate contends that, in Entergy, 88 FERC at 61,500, the Commission found a similar provision to be inadequate because Delaware law may extend the fiduciary duties of the Board to the member companies' non-transmission interests.

Industrial Consumers, EPSA, Calpine and SC Consumer Advocate note that the fiduciary responsibilities to the RTO obligate the GridSouth Board to maximize the value of the transmission owners' assets. They contend that, in dealing with the issue of

¹⁸Order No. 2000 at 31,067.

congestion management, this fundamental duty will bias the Board toward collecting transmission rents, instead of relieving transmission congestion through redispatch or facility expansion. They argue that, while the decision to collect congestion rents may be consistent with the Board's fiduciary duty, such a choice may be inefficient and not in the best interest of the market. Industrial Consumers propose the use of an independent auditor to deter this conflict. EPSA proposes that, to eliminate what it characterizes as the "inherent" conflict of a for-profit transco when designing markets, the Commission direct the establishment of a neutral regional organization that will design the power market and set market rules for the entire Southeast.

e. Stakeholder Advisory Committee

Numerous intervenors protest that the proposed SAC will not insure the independence of GridSouth because the Board would not be bound by the SAC's recommendations. Further, they protest that the proposal does not provide guidelines regarding when the SAC can provide input into decisions affecting stakeholder interests and whether the Board must consider such input, but leaves these matters to the discretion of the Board. CUCA proposes that the SAC be given specific duties, such as selecting the Board and market monitor and addressing improvements in operations.

Intervenors note that the Applicants have not provided cost support for the proposed initial and annual fees. They argue that, while the fees alone may not prevent stakeholder participation, stakeholders may conclude that it is pointless to pay a fee to designate a representative to the SAC when there is no assurance that the committee will have any influence on the Board. Others contend that GridSouth should waive or reduce the initial and annual fees for representatives of consumer groups.

Dynegy notes that, while a single company cannot be a member of more than one segment, it is not clear whether initial members can choose to join either the generation owners group or the transmission owners group. Dynegy asks for clarification on this and contends that, if the initial members can join the generation owners group, the initial members could have a great deal of leverage in SAC matters. Industrial Consumers complain that the proposed SAC does not have an industrial representative. Other intervenors contend that the Applicants should admit the fifth category, retail customers, from the beginning of GridSouth operations, or at least some reasonable time prior to the onset of retail competition since retail customers' interests may be impacted by GridSouth's actions prior to the implementation of retail unbundling in the Carolinas.

3. The GridSouth Applicants' response

The Applicants respond that the intervenors' comments either misconstrue the GridSouth formation documents or misapply the requirements of Order No. 2000. They note that Order No. 2000 specifically recognized the lawfulness of properly designed passive interests in an RTO.

The Applicants contend that the provision of the LLC Agreement that lists specific activities that require approval of a super majority of the members is necessary to preserve the integrity of the members' capital investment in GridSouth, and does not undermine the RTO's independence. They claim that transmission owners will not assume a passive interest in an RTO without reserving some limited rights, and contend that the enumerated activities do not confer to the GridSouth members any control over day-to-day operating decisions of the Board.

With regard to the Board selection process, the Applicants respond that their proposal will produce an independent Board, noting that all Board candidates will be recommended by an independent search firm, and that intervenors will have at least two opportunities to challenge the independence of proposed candidates. They also note that, once selected, the Board members are prohibited from favoring GridSouth members. The Applicants contend that, in the context of forming a for-profit company, stakeholders do not have the right to choose the individuals that will direct the company.

The Applicants respond that it is commercially infeasible to allow the SAC to control the actions of the for-profit transco, which has otherwise satisfied the independence criteria. They contend that the specific guidelines for stakeholder input should be left to the independent Board. Further, they agree that there is merit in allowing end users to participate in the SAC from the outset, and are willing to include end users as members of the committee if ordered by the Commission.

The Applicants deny that the provisions of the LLC Agreement inhibit the Board's independence in raising capital, and claim that the contested provisions are necessary to protect the passive owners investment. They argue that a poorly-timed IPO can have major adverse financial consequences, and that it is more important for passive owners to have the right to protect themselves against a poorly-timed IPO than it is for the Board to have the unlimited right to tender an IPO. The Applicants also contend that the a veto right over capital contributions is appropriate because, while the GridSouth members will make initial capital contributions to support the start-up of the RTO, the members should not be obligated to make capital contributions for an indefinite period.

4. Discussion

We find that, subject to the modifications discussed in this order, GridSouth will be independent of market participants in both perception and reality¹⁹ and, therefore, Applicants' proposal satisfies the independence requirement of Order No. 2000. Pursuant to the proposal, GridSouth directors, officers and employees may not have any affiliation with, or any direct financial interest in, any market participant, and may have an indirect financial interest in limited circumstances that the Commission has previously accepted.²⁰ Further, the Applicants have proposed Standards of Conduct that set clear guidelines to prevent the control of the decision-making process by market participants.

GridSouth has taken strides in achieving true independence by proposing an RTO in which the transmission owners will retain only a passive interest. Likewise, Applicants' proposal to create a non-stakeholder Board, in which market participants may have input through a stakeholder advisory committee, provides a solid basis for independent decision-making.

Further, as required by Order No. 2000, the Applicants have proposed a process for an independent compliance audit to ensure the independence of the GridSouth Board's decisionmaking from the passive owners. The proposal also authorizes GridSouth to make section 205 tariff filings. We are satisfied that these major features of the proposed RTO, together with the specific provisions discussed below, as modified, establish an organization in which "the passive owners have relinquished control over operational, investment and other decisions to ensure that the RTO will treat all users of the grid - passive owners and others - on an equal basis in all matters."²¹

a. Passive ownership

GridSouth will operate as a transco, and its members will retain a passive ownership interest, without any day-to-day control over RTO activities. While certain intervenors express a general concern that the GridSouth members' retention of a passive ownership interest in the RTO will compromise independence, Order No. 2000 made clear that

¹⁹Order No. 2000 at 31,065.

²⁰The provisions that the Applicants have proposed concerning pension funds of former employees and indirect financial interests in members and market participants closely track provisions previously accepted by the Commission, and are here accepted. See GridFlorida LLC, 94 FERC ¶ 61,020, mimeo at 16 (2001) (GridFlorida); Midwest Independent Transmission Operator, Inc., et al. 84 FERC ¶ 61,231 at 62,153 (1998).

²¹Order No. 2000 at 31,066.

passive ownership of a transmission entity is acceptable if properly designed.²² Order No. 2000 further states that the Commission will review passive ownership proposals on a case-by-case basis, and will approve a proposal only if the Commission is satisfied that the passive owners have relinquished control over operational, investment and other decisions. These particulars of whether the passive owners will relinquish control over GridSouth are the subject of intervenor comments and protests, and discussed in detail below. We find that, while some specific provisions of the proposed RTO formation documents require modification to satisfy the independence characteristic of Order No. 2000, the Applicants' proposal will create an RTO in which the passive owners have relinquished control over the decision making process.

Further, Santee Cooper misconstrues Order No. 2000 when it suggests that passive ownership is appropriate only when the transfer of ownership of transmission assets is imminent so that transmission owners will not suffer from the tax treatment of having to recognize capital gains on the transfer of their facilities. As noted by the Applicants in their response, Order No. 2000 also recognized the need for the Commission to take actions "to ensure that the stand-alone transmission business is financially attractive and viable."²³ Accordingly, we deny the protests on this point.

b. Passive owners' veto rights over fundamental business decisions

In Order Nos. 2000 and 2000-A, we recognized the need for passive owners to protect the value of their assets they commit to and investments they make in the RTO and found that these concerns must be balanced against the need for an independent RTO.²⁴ As a general matter, we find that a limited reservation of rights over certain fundamental business decisions is an acceptable means for the GridSouth members to preserve their financial investment.²⁵ Further, we disagree with the intervenors' argument that the reservations should not apply until the members transfer ownership of their transmission assets to GridSouth. Rather, it is appropriate for the members to retain the enumerated rights from the date of this order, since the commitment to turn over their assets to the RTO triggers their concerns about protecting the integrity of their financial investment.

²²Id.

²³Id., at 31,064.

²⁴Order 2000-A at 31,366.

²⁵See Alliance Companies, 91 FERC ¶ 61,152 at 61,581-82 (2000) (accepting limited specific veto power of transmission owners).

In addition, intervenors protest specific provisions that would require an affirmative vote of a super majority of the GridSouth members for the Board to take certain actions:

1. Section 6.13 (b)(iv) of the LLC Agreement requires the members' approval for the Board to "cause [GridSouth] to merge with or consolidate into another limited liability company or other business entity ... including, without limitation, another RTO." Intervenors protest that the passive owners should not retain power to veto a proposed GridSouth merger with another RTO. They claim that this provision could prevent GridSouth expansion since, under the proposed voting rules, any one passive owner could veto a proposed change in the makeup of GridSouth. They further argue that this provision could deter the development of a competitive wholesale market, and that a truly independent Board should have the ability to freely choose what it believes is the best course for GridSouth and the consuming public.

In response, the Applicants state that this provision is necessary to assure that passive owners will continue to be members of the business entity that they originally agreed to join. They state that it is critical for the members to have the right to participate in, and veto if necessary, any decision for GridSouth to join an organization with a non-profit structure.

In Alliance Companies, 91 FERC at 61,581, we stated that "it is reasonable for passive owners to expect protection of the integrity of their capital investment . . ." We will permit the passive owners to exercise their veto rights subject to that limitation and subject to review by this Commission. We fully expect GridSouth to provide the platform for RTO expansion in the Southeast. Because it will be independent, we expect the Board of GridSouth to make corporate expansion decisions which are, consistent with their fiduciary duties, in the best interests of GridSouth. If a passive owner is dissatisfied with a merger or consolidation decision by the independent Board, it must come to the Commission and affirmatively demonstrate that the proposed merger or consolidation would adversely impact the integrity of its investment. Similarly, other affected parties may file a complaint asking the Commission to review a passive owner's exercise of the veto right.

2. Section 6.13(b)(ix) of the LLC Agreement confers the GridSouth members with the right to veto plans to amend equity-based compensation plans for Board members and senior officers. Williams, EPSA, Joint Protestors and SC Consumer Advocate protest that this provision gives the Applicants control over the actions of these individuals and compromises the RTO's independence.

In response, the Applicants argue that this provision is necessary to protect the GridSouth members against the devaluation of their equity interests since the issuance of

stock to Board members or officers dilutes the value of the remaining interests. They contend that this provision does not give the GridSouth members greater control over the Board since it only relates to changes in the initial equity compensation plan.

The Commission agrees with the intervenors' protest on this point. The Board's fiduciary duty to protect the integrity of the members' capital contributions provides sufficient assurance to the passive members. Further, the passive members' ability to veto changes to the Board members' and officers' equity compensation could impact their independence, and certainly the perception of independence. In the balance, we are not convinced that the threat of dilution of owner interests is so great as the risk of compromising the Board's independence.

3. Section 6.13(b)(x) of the LLC Agreement provides that, absent member approval, the Board cannot cause GridSouth to engage in business outside that related to the transmission of electric power. SC Consumer Advocate argues that this provision should be stricken since it is possible that the RTO may find it more efficient to remedy transmission shortcomings by taking steps other than simply adding transmission lines.

The Applicants argue that this provision is necessary to prevent the Board from transforming GridSouth into a business other than an RTO contemplated under Order No. 2000.

We deny the protest on this point. The GridSouth members are entitled to assurance that, when they turn their transmission facilities over to the RTO's control, the RTO will not expand into other businesses not contemplated by the members. Further, this provision does not preclude GridSouth from resolving a transmission problem with a generation solution if that is the least-cost solution. Incurring such a cost is clearly "related to the transmission of electric power."

4. Section 6.13(b)(vi) requires super majority approval of the passive owners before the Board can make an initial public offering (IPO) of equity securities. Intervenors contend that this provision will inhibit the ability of GridSouth to raise capital independently of its passive owners, which is one of the Order No. 2000 considerations when determining independence.²⁶ They claim that this provision removes from the Board the power to raise capital by issuing equity interest to new owners through an IPO, even if the Board and a simple majority of the members believe an IPO to be prudent. They argue that the provision is unnecessary to protect the members' interests in light of the Boards' fiduciary duty to protect the integrity of the members' capital contributions.

²⁶Order No. 2000 at 31,067.

Applicants respond that an IPO is a major transaction, and that a poorly-timed IPO can have major adverse financial consequences, including tax consequences, to the members. They argue that it is more important for passive owners to have the right to protect themselves against a poorly-timed IPO than it is for the Board to have the unlimited right to tender an IPO.

The Commission agrees that an IPO is a fundamental business decision that is likely have a significant impact on the passive owners' investment in GridSouth. Moreover, we do not believe this provision unduly interferes with the right of GridSouth to raise capital independent of the passive owners since section 4.4 of the LLC Agreement authorizes the GridSouth Board to raise capital through issuances of equity and debt, limited only by the reservations set forth in section 6.13(b).²⁷ Further, the issuance of an IPO is an extraordinary event for an RTO, and the members' retention of a veto right on this matter will not impact the Board's independent decision making on matters in the normal course of business. Accordingly, we deny the intervenors' protest on this issue.

5. Section 6.13(b)(viii) of the LLC Agreement requires super majority approval of the passive owners of a Board decision to require members to make additional capital contributions. Intervenors protest that GridSouth's ability to raise capital independent of its passive owners is compromised by this provision. Intervenors argue that calls on capital are not uncommon in closely-held corporations, and the proposed limitation could hamper the RTO's ability to raise capital. They note that, while the Board is authorized to issue debt security, it must have member approval to issue debt securities that contain terms requiring members to provide additional capital contributions. They argue that this limitation could make the debt security less desirable to potential bondholders.

The Applicants respond that, while the GridSouth members will make initial capital contributions to support the start-up of the RTO, the members should not be obligated to make capital contributions for an indefinite period. They contend that the essence of a limited liability corporate structure is to afford investors the ability to limit their liability in the company to their investment and, without this provision, transmission owners would be reluctant to join the RTO. They note that, under the LLC Agreement, the Board has other means to raise capital by issuing new equity or incurring debt.

²⁷Section 4.2(c) of the LLC Agreement provides that "the Board is authorized, in order to raise additional capital for the Company to cause the Company to sell Interests from time to time to others Persons and to admit them to the Company as Additional Members pursuant to the terms of this Agreement, subject to section 6.13(b)." Section 4.4(e) authorizes the Board to issue debt securities on "terms and conditions established at the discretion of the Board, all without the approval of the Members or any other Person ..."

The Commission denies the intervenors' protest on this matter. As mentioned above, section 4.4 of the LLC Agreement authorizes the GridSouth Board to raise capital through issuances of equity and debt. The intervenors have not shown that section 6.13(b)(viii) will significantly impinge on the Board's ability to raise capital. Moreover, we agree with the Applicants that the passive owners should not be obligated to provide capital to the RTO for an indefinite period.

c. Board selection and removal process

The proposed selection process allows stakeholder input only after the slate of candidates has been reduced but before the final selection.²⁸ In GridFlorida, 94 FERC at 61,046, the Commission approved GridFlorida's Board selection process. That process allowed for a search firm to initially choose the entire slate of directors but allowed a Board Selection Committee to replace as many as four of the candidates with alternate candidates also proposed by the search firm. The Commission found that this proposed process, including the peremptory challenges, satisfied the requirement that an independent Board would be selected. Therefore, we will require a similar obligation for GridSouth to permit peremptory challenges by the Stakeholder Advisory Committee or, if not formed yet, by a similar committee composed of GridSouth stakeholders. With respect to the selection process that has occurred to date, we will require the Applicants to go back to the original slate of candidates selected by the search firm and permit the passive owners and the stakeholder representatives to strike an equal number of candidates. The Applicants are directed to do this no later than March 29, 2001.

Further, we agree with the intervenors who contend that the Commission should not be in the business of evaluating whether particular proposed Board members are fit for office.²⁹ Accordingly, the Applicants should revise their proposal to eliminate Commission review and acceptance as the final step in the Board selection process.

While intervenors protest that the Applicants have not identified the criteria that will be used for candidate selection, we note that GridSouth has posted the criteria on its

²⁸We note that, according to a December 22, 2000 (revised January 26, 2001) Announcement posted on the GridSouth website, the independent search firm has already completed its recommendations, and the Applicants have reduced the slate of candidates to twelve, and are currently interviewing these candidates for the final selection.

²⁹The Commission's concern is the independence, not fitness, of the Board. Since we are satisfied that the proposed selection process, as modified, will result in an independent Board, we do not need to review the independence of individual members.

website.³⁰ These criteria, which consist of a recitation of the Board selection process stated in the LLC Agreement and the definition of "Independent Person" contained in the Master Definition List, are straightforward and fair criteria.

While the Applicants represent that at least one Board member will have experience in the public power sector,³¹ Schedule E of the LLC Agreement, which outlines the Board selection process, does not contain such a requirement. The Applicants should revise Schedule E to state this explicitly.

We disagree with the protests that the lack of Board term limits will perpetuate the "flawed" selection process. As discussed above, we believe that the proposed process is acceptable. Further, allowing multiple terms will allow the RTO to retain experienced, qualified Board members. The provisions allowing only GridSouth members to remove Board members for cause are consistent with those previously accepted by the Commission, and are here accepted.³²

d. Board of directors fiduciary duties

The proposed statement of fiduciary duties provides sufficient assurance that Board members will disregard the interests of GridSouth members other than their investment in GridSouth's transmission business. We accepted language to the same effect in Alliance Companies, 94 FERC ¶ 61,070, mimeo at 14 (2001).³³

Further, intervenors claim that the Board's fiduciary duty to maximize the value of the RTO's transmission assets creates a bias towards certain solutions to congestion management. However, since the Applicants have not yet submitted their congestion

³⁰November 10, 2000 "Announcement" at www.gridsouth.com/Search.Firm.htm.

³¹Transmittal letter at 22.

³²See GridFlorida, mimeo at 7; Entergy, 88 FERC at 61,501.

³³To assuage our concerns expressed in Entergy, 88 FERC at 61,501, that Delaware law may require board members' fiduciary duties to extend even to member companies' non-transmission interests, the Applicants state that Delaware law affords parties broad authority to contractually structure the scope of a company's fiduciary duties, citing *Elf Atochem North American, Inc. v. Jaffari*, 727 A.2d 286, 290-91 (Del. Supr. 1999); *Sonet v. Plum Creek Timber Co.*, 722 A.2d 319, 322 (Del. Ch. 1998).

management proposal, it is too early to determine whether this is in fact a problem. When GridSouth submits its congestion management proposal, we will consider this issue.

e. Stakeholder Advisory Committee

Consistent with other two-tiered forms of governance that the Commission has considered for ISOs,³⁴ we accept the Applicants' proposal that the GridSouth Board will not be bound by the recommendations of the SAC. However, the proposed RTO documents do not provide guidelines regarding communication of information by the Board to the SAC, when the SAC can provide input into decision making, and whether the Board must consider such input. The Applicants acknowledge that the LLC Agreement does not provide such detail and state that the LLC Agreement leaves to the Board and stakeholders the right to develop specific procedures. Consistent with our approach in Alliance Companies, 94 FERC ¶ 61,070, mimeo at 14, we agree that, rather than require the Applicants to unilaterally propose procedures and have the Commission direct changes based on the comments of stakeholders, the better approach is for the Applicants to develop an advisory process in consultation with stakeholders.

Intervenors request that retail customers be admitted to the SAC from its inception, and the Applicants acknowledge the merit of the proposal. We agree that the interests of retail customers will be impacted prior to retail unbundling and, therefore, the Applicants should submit revisions to the RTO documents to allow retail user representation on the SAC from its inception.

Dynegy asks for clarification whether GridSouth members can choose to join either the transmission owners or generation owners group. While the Applicants did not clarify this matter in their response, our provisional approval of the proposal is based on the presumption that the members are limited to the transmission owners' group. If the Applicants' intent is otherwise, they should file a clarification along with a justification of the need for this flexibility.

Finally, we deny protests regarding the proposed initiation and annual fees. We have consistently found that such de minimis fees are reasonable.³⁵ Further, we will defer to the GridSouth governance structure to determine whether to waive or reduce the fees for representatives of consumer groups.

³⁴See Order No. 2000 at 31,073.

³⁵See Pennsylvania-New Jersey-Maryland Interconnection, 81 FERC ¶ 61,257 (1997), reh'g denied, 92 FERC ¶ 61,282 (2000) (PJM).

Governance Issues:

a. Section 4.1 of the LLC Agreement - Class B shares/independent trustee

As part of the scheme to arrange passive ownership, section 4.1(d) of the LLC Agreement provides that market participants will own shares of Class C stock, which entitles them to share in profits and losses, but not to vote. Section 4.1(c) of the LLC Agreement provides that Class B shares of stock, whose owners have the right to vote but not to share in profits and losses, will be held by an independent trustee pursuant to the terms of an Independent Trustee Agreement. According to the Applicants, the trustee will initially hold the voting rights of GridSouth members, and the trustee must vote consistent with the decisions of the Board. Joint Protestors and Santee Cooper question the purpose of designating an independent trustee. They also question why it is necessary for GridSouth to issue Class B shares of stock, since the members will own "Class C" equity that does not permit them to vote. Further, Santee Cooper contends that the Commission cannot determine the independence of GridSouth without reviewing the Independent Trustee Agreement, which has not been filed with the Commission.

The Applicants explain that section 4.1 of the LLC Agreement divides the equity interests of market participants into Class B and Class C shares. According to the Applicants, the Class C interests contain the economic rights associated with passive ownership interests in GridSouth, and the Class B interests contain the voting rights. They state that, because market participants may not have voting rights in the LLC, the Class B interests will be held by the independent trustee. They contend that the Class B interests are a means of severing voting rights from the interests held by market participants, and the Class B interests are critical to ensuring GridSouth's independence from the passive owners. The Applicants explain that, under the Independent Trustee Agreement, the trustee will perform a "purely ministerial function." They state that the trustee will have no discretion to take any action other than voting the Class B interests in accordance with the vote of the Board. Further, the Applicants state that they will post the Independent Trustee Agreement on the GridSouth website and submit it to the Commission prior to execution.

We accept the Applicants' explanation as sufficient. Given the purely ministerial nature of the Independent Trustee Agreement, this document is not critical to our conclusion regarding GridSouth's independence. At this time, we will require the Independent Trustee Agreement to be filed as an informational filing.

b. Section 4.4(b) of the LLC Agreement - unclaimed Class C interests

Section 4.4(b) of the LLC Agreement provides that, "in the event that any Person who agrees to permit the Company to exercise Functional Control over its Transmission

Assets does not elect to purchase the Class C Interests offered to it pursuant to Section 4.4(a) (and such Person otherwise has the statutory or regulatory authority to purchase such Class C Interests), the Board shall offer each existing holder of Class C Interests the right to purchase such unpurchased Class C Interests." Joint Protestors argue that this provision is designed to exclude others from joining GridSouth.

Applicants respond that this provision does not limit participation in the LLC but, rather, allows the existing members to maintain their pro rata share of their ownership interest in GridSouth once an entity decides not to participate.

We deny the protest on this issue. This provision only applies to Class C, non-voting shares. The Applicants see a need for it and the intervenors have not shown the problem with this provision and therefore will accept it.

c. Section 4.4(d) of the LLC Agreement - right of first refusal

Section 4.4(d) of the LLC Agreement gives the existing GridSouth members a right of first refusal to purchase new equity interests issued by the GridSouth Board. Joint Protestors and CUCA protest that, by exercising the right of first refusal, existing members can exclude new entities from obtaining ownership interests in GridSouth.³⁶

The Applicants respond that this is a standard provision in LLC agreements that protects the existing members against a dilution of the value of their membership interests should the Board issue new equity at too low a price. They contend that, since the members cannot prevent the issuance of undervalued equity, the LLC Agreement gives the GridSouth members the right to protect themselves by purchasing the equity at that price.

The Commission finds that the anti-dilution provision is acceptable to protect the value of the investment of the GridSouth members.

d. Section 6.21(a) - contracting with market participants

Section 6.21(a) of the LLC Agreement and section 4.08 of the TOA both prohibit the RTO from entering into a contract or agreement with a member or market participant or affiliates unless such agreement contains "substantially such terms and conditions as would

³⁶Section 4.4(d) further states that the rights of members under this provision expire upon the consummation of an IPO. From this statement, it appears that the provision refers only to the Board's issuance of Class C shares prior to an IPO. If this is not the intent, GridSouth should clarify this provision.

be contained in a similar agreement or contract entered into by the Company as the result of arm's-length negotiation from a comparable unaffiliated, disinterested third party." Joint Protestors and Santee Cooper protest that this provision compromises independence, and question what procedures would be used to ascertain whether the terms were substantially the same as those in a comparable arm's length agreement, who would make this determination, and what consequences would result if this provision is not honored.

The Applicants respond that the provision allows GridSouth flexibility to enter into contracts with affiliates and members when they are advantageous to GridSouth, while protecting members and customers from the possibility of GridSouth entering into "sweetheart" contracts with other members or affiliates.

In Alliance Companies, 91 FERC 61,572, we stated that Alliance must use competitive bidding when seeking to procure goods and services from members or market participants. GridSouth's provision does not specify the competitive bidding requirement. Accordingly, the GridSouth Applicants must revise section 6.21(a) to provide greater specificity and reflect that the RTO will use competitive bidding when seeking to procure goods and services from members or market participants.

e. Right to examine GridSouth's books

Section 7.1 of the LLC Agreement provides each member the right to examine the RTO's books, records and documents. Joint Protestors note that the only limitation in this provision is that commercially sensitive information with respect to any other member shall not be disclosed. They argue that, while members have a legitimate need for certain financial information, the provision is too broad and should be revised to prohibit member access to commercially sensitive information regarding GridSouth operations.

The Applicants state that, while the provision is not intended to give the members access to competitively-sensitive information, they agree to modify the provision to clarify that GridSouth is not required to provide commercially sensitive information about its operations to GridSouth members. This revision would provide a useful clarification and, accordingly, we direct the Applicants to revise section 7.1.

f. Section 9.5 of the LLC Agreement - initial public offering

Section 9.5 provides that, if an IPO has not occurred after ten years of operation, the LLC members have the right to compel the GridSouth Board to effect an IPO, provided that the Board first receives a letter by an investment bank that an IPO would be in the company's best interest. Intervenor protest that the passive owners' retention of the right to compel an IPO hinders GridSouth's ability to make independent financial decisions.

Further, they argue that the provision disadvantages new members since they must have (alone or in aggregate) a minimum 15% interest to trigger an IPO, while any initial member owning a 5% or more interest in GridSouth can trigger an IPO.

The Applicants contend that the provision provides the members a viable option for divesting their transmission assets and exiting the transmission business. They claim that it promotes independence by encouraging a transaction that will place control of GridSouth in the hands of public shareholders. They note that the requirement to obtain a letter of recommendation protects against an untimely or ill-advised IPO.

While the provision allows the GridSouth members to retain a limited power, it also encourages greater RTO independence. In this aspect, we accept this provision as reasonable. However, the Applicants have not explained why the ownership interest necessary to trigger an IPO differs for new members. The Applicants should revise section 9.5 so that all members are on an equal footing.

g. Disclosure of conflicts of interest

Section II.C of the proposed GridSouth Standards of Conduct states that GridSouth shall require consultants and contractors to disclose all financial affiliations and conflicts of interest with members or market participants. The provision further states that GridSouth shall have the discretion to determine whether the contents of such disclosure warrant disqualification of the consultant or contractor. Joint Protestors contend that, given that the Applicants' proposal allows the initial members to select the Board and senior officers, the GridSouth management should not have such broad discretion regarding when to disqualify a firm that may have financial affiliations or conflicts.

The Applicants respond that the Board should have discretion to waive a conflict of interest since not all conflicts of interest are problematic, for example when the conflict is de minimis. They also point out that the Board must exercise reasonable judgment and may not waive conflicts that would be problematic.

We agree that the Board should have discretion to waive the conflict of interest requirement. A strict rule without exception may operate to GridSouth's detriment since it may otherwise lose the opportunity to contract with the most qualified consultant or contractor. Further, a truly independent Board should be able to exercise reasonable discretion in determining whether a consultant's or contractor's affiliation with a member or market participant will be problematic. However, when the Board exercises its discretion in this area, GridSouth should post on its website a notification that describes

the exercise of such discretion, including the name of the affiliate, the services that the affiliate will provide and the duration of the contract.

RTO Characteristic No. 2: Scope and Regional Configuration

The RTO must serve an appropriate region.

1. The GridSouth Applicants' Proposal

The Applicants contend that GridSouth will meet the Commission's minimum requirements regarding scope and regional configuration. They state that GridSouth will cover an area of about 65,000 square miles with 34,000 MWs of connected peak load and 22,000 miles of transmission lines. The Applicants claim that the proposed boundaries are rational and consistent with Order No. 2000 because GridSouth will encompass a contiguous area, and does not have any internal holes that could complicate the provision of transmission service. They also note that GridSouth participants have a history of cooperating on transmission assessment and expansion planning.

The Applicants claim that their proposal satisfies the other factors examined by the Commission in terms of scope and configuration. For example, they state that, pursuant to the terms of the TOA, GridSouth will be responsible for calculating ATC, internalizing loop flow across participants' transmission systems, working with neighboring RTOs to resolve loop flow issues, ordering redispatch for reliability purposes and facilitating redispatch that might be needed to support requests for new transmission service (*i.e.*, congestion management). Further, according to the Applicants, the GridSouth rate proposal eliminates pancaked rates for transmission service through the region, GridSouth will provide "one stop shopping" for transmission service through the region on a single OASIS site, and GridSouth will be responsible for transmission planning.

GridSouth, as proposed, will initially include the transmission facilities of three transmission owners, Duke, SCE&G and CP&L, and will cover the geographic territory of portions of North Carolina and South Carolina. The Applicants state that GridSouth will have an "open door policy" for any public power transmission system that wants to join either as a participant that transfers functional control of its assets to GridSouth or as a transmission customer.³⁷ The Applicants state that they will encourage expansion and, in

³⁷Transmittal letter at 70.

this respect, proffer that GridSouth "represents a significant blueprint that can be a platform for the development of a larger RTO."³⁸

2. Intervenors' Comments

Numerous intervenors protest that the scope and configuration of GridSouth is inadequate because it is too small in size and number of transmission owners to be considered a truly regional organization.³⁹ They contend that GridSouth cannot serve an appropriate region as contemplated by Order No. 2000 without the presence of other regional entities, such as Santee-Cooper and other regional electrical cooperatives and municipal power systems in the Carolinas. They also contend that the proposed RTO divides recognized trading patterns, and that a proper integrated region should include the Southern Companies Services, Inc. (Southern), Tennessee Valley Authority (TVA), GridFlorida LLC and Dominion Virginia Power (Dominion). Calpine, EPSA and Alabama Municipal support the creation of an "umbrella" organization that would coordinate the activities of the entities within the Southeast region.

SC Consumer Advocate argues that, although the Applicants state that they welcome new members, in reality the proposed structure protects the control that the initial members have over GridSouth. Likewise, Joint Protestors argue that the structure of the proposed GridSouth RTO excludes public power and cooperative transmission systems. They state that, under the proposed financial structure, Santee Cooper, which accounts for about 40% of South Carolina's total transmission capacity, cannot own equity in GridSouth due to limitations under South Carolina law. Joint Protestors further argue that the proposed RTO structure effectively excludes municipalities because they would lose their tax exempt status upon becoming a GridSouth member. They contend that the Applicants excluded cooperatives such as Central and New Horizon from formation discussions, and claim that the result of such exclusion is a proposal that does not accommodate the special tax circumstances of cooperatives.

In a related vein, Santee Cooper argues that the GridSouth RTO filing fails to comply with the Commission requirement that any proposal to participate in an RTO "must include an explanation of efforts made to include public power entities ... in the proposed Regional Transmission Organization." 18 C.F.R. § 35.34(d)(4) (2000). It claims that the absence of such explanation can be attributed to the absence of discussion between GridSouth and public power transmission systems such as Santee Cooper.

³⁸Transmittal letter at 39.

³⁹E.g., Alabama Municipal, Dynegy, Calpine, Joint Protestors, Santee Cooper, New Horizon, SC Consumer Advocate, CUCA, Williams, EPMI and Coral.

Joint Protestors argue that GridSouth's failure to include transmission facilities owned by Lockhart Power Company (Lockhart), a privately owned utility company located within Duke's service territory, is inconsistent with the Applicants' claim that GridSouth does not have any internal holes that might complicate the provision of transmission service.

Joint Protestors note that, in Order No. 2000, the Commission stated that "to have a competitive market, it is important to create an RTO region that is not dominated by a few buyers or sellers of energy."⁴⁰ They argue that the GridSouth proposal is flawed because the area it would encompass does not include a reasonable number of energy supply alternatives but, rather, the GridSouth Applicants dominate energy supply in the area. Based on publicly available information regarding the market penetration of merchant generation, Joint Protestors calculated that merchant generation could serve only 4.5% of the peak load in the proposed GridSouth region. They contend that this amount is substantially less than the peak load served by merchant generation in existing ISO regions. Joint Protestors argue that, as a result of the concentration of generation ownership, the three Applicants will dominate the energy market in the proposed GridSouth region and will present a real risk of anticompetitive practices and behavior.

Joint Protestors and CUCA argue that the Applicants have failed to demonstrate that their proposal will satisfy the various factors that the Commission considers when analyzing scope and regional configuration. They claim, for example, that the Applicants did not attempt to show that the proposed configuration of GridSouth will internalize significant transmission loop flows in the region as a whole, or that it will facilitate the management of congestion. Likewise, they claim that the Applicants have not addressed the elimination of pancaked rates within the broadest possible energy trading area as discussed in Order No. 2000. They contend that the proposed RTO configuration does not correspond to the strength of interconnections, established trading patterns, or number of alternative suppliers in the region. Joint Protestors and New Horizon protest that the Applicants' proposal does not go far enough in eliminating pancaked rates, noting that a GridSouth network customer purchasing power from Santee Cooper must pay two transmission charges, one to Santee Cooper and one to GridSouth.

3. GridSouth Applicants' Response

The Applicants respond that the intervenors' call for a single Southeastern RTO ignores political and geographic realities as well as timing constraints facing the Applicants. They state that TVA participation is currently limited by federal statute. The

⁴⁰Order No. 2000 at 31,084.

Applicants also claim that a requirement that GridSouth and Southern coordinate their proposals at this time would delay the implementation date and require the parties to start over at great expense. They state that Dominion has opted to join the Alliance Transco and GridSouth does not have any unique incentives to persuade Dominion to change its decision.

With regard to the claim that the Applicants effectively excluded public power entities in the Carolinas such as Santee Cooper, the Applicants respond that these entities are welcome to join GridSouth. The Applicants state that the section 2.12 of the TOA was drafted to enable Santee Cooper and other public power entities to transfer functional control of their transmission assets to GridSouth, even with GridSouth operating as a for-profit Transco. They contend that, under this arrangement, these entities would not have to purchase any equity interest to transfer functional control of their transmission assets.

4. Discussion

The Commission finds that GridSouth, while not ideal with respect to scope and configuration, represents a good first step toward the creation of an RTO in the Southeast region and can serve as a platform for the formation of a larger RTO in the Southeast. Contingent upon a technical conference discussed below, we will provisionally accept its scope as a starting point, and we strongly encourage GridSouth to continue to expand as the Applicants have acknowledged they will in their Application and response. As proposed, GridSouth will encompass an area of about 65,000 square miles and its facilities will include 22,000 miles of transmission wires. The RTO will manage a connected peak load of 34,000 MWs. The boundaries of GridSouth will encompass a contiguous area. Further, the Applicants' history of cooperating together on transmission assessment and expansion planning make them a logical platform for RTO formation and development.

The Applicants represent that the proposed region does not have any internal holes that might complicate the provision of transmission service. Intervenors note that the transmission facilities of Lockhart are not included in the GridSouth proposal. In its own compliance filing, Lockhart states that its transmission system consists of 35.4 kV lines that serve as a radial extension of Duke's system.⁴¹ It also states that it is exploring "opportunities of mutual advantage" with GridSouth. While we encourage Lockhart and GridSouth to continue such discussions, given Lockhart's limited facilities and radial configuration, its current absence does not seriously complicate the provision of transmission service by GridSouth. Lockhart being the only noted exception, we find that

⁴¹Docket No. RT01-57-000.

the lack of Lockhart's participation at this stage should not preclude GridSouth from achieving RTO status.

We recognize the legal and tax difficulties of public power and cooperative transmission systems obtaining an ownership interest in a for-profit transco. At the same time, we respect the right of the Applicants to choose the type of RTO formation organization consistent with Order No. 2000. We note that GridSouth's formation documents provide a mechanism for entities that do not seek to join as "Class C" members to turn over functional control of their transmission facilities to the RTO.⁴² Santee Cooper, which acknowledges that the South Carolina State Constitution and federal tax laws impose restrictions on its participation in a for-profit organization such as GridSouth, states that within these constraints it could integrate its facilities with those of GridSouth through a coordination or "seams" agreement.⁴³ While we do not expect seams contracts to substitute for scope, we do expect GridSouth to pursue solutions with Santee Cooper and other public power entities.

Santee Cooper alleges that GridSouth's collaborative process was exclusionary to Santee Cooper. We are concerned that there has not been sufficient communication between Santee Cooper and the GridSouth Applicants with regard to the possible inclusion of Santee Cooper in the GridSouth RTO. Therefore, we direct GridSouth and Santee Cooper to participate in a staff conference within 15 days with Commission staff to explore possible solutions to the concerns that Santee Cooper has raised. Further, we direct Commission staff to file a report within 15 days after the staff conference.

The Applicants' proposal will also centralize ATC/TTC calculations and create one OASIS for all RTO members. GridSouth will redispatch generation for reliability purposes while developing a long-term plan for congestion management.

While the proposal would eliminate pancaked transmission rates among the GridSouth members, intervenors point out that pancaking continues for market participants that take transmission service on GridSouth and have as a sink a public power provider located within Santee Cooper's service territory. GridSouth needs to further explore the elimination of rate pancaking through expansion.

⁴²E.g., section 2.12 of the TOA.

⁴³Santee Cooper at 30-32.

Further, we agree with the Applicants' assessment that GridSouth "represents a significant footprint that can be a platform for the development of a larger RTO"⁴⁴ and "GridSouth represents a significant first incremental step towards RTO implementation in the Southeast."⁴⁵ Along these lines, we believe that the GridSouth formation documents provide a blueprint for attracting other entities in the Southeast region seeking to comply with Order No. 2000 and enjoy the benefits of RTO formation.

The Applicants' proposal reflects a realistic and balanced effort to create an RTO in the Southeast region. However, we emphasize that GridSouth must continue to expand in the region as the Applicants represent and commit in their filing. Expansion to include Southern, TVA, Santee Cooper and other public power entities and even GridFlorida and other regional entities with RTO filings pending before the Commission would enhance the scope and configuration of GridSouth and increase the RTO's importance in the region.

In consideration of the above, and contingent upon Applicants' participation in a staff conference with Santee Cooper, we conclude that the GridSouth Applicants' proposed scope and configuration are consistent with Order No. 2000. GridSouth must file a status report by May 14, 2001 that addresses its efforts to expand the scope of the proposed GridSouth RTO.

RTO Characteristic No. 3: Operational Authority

The RTO must have operational authority for all transmission under its control.

1. The GridSouth Applicants' Proposal

The Applicants state that, pursuant to the TOA, GridSouth will exercise functional control over the Applicants' transmission facilities over which service currently is provided under their respective open access transmission tariffs. They state that GridSouth will have the authority to direct transmission operations, monitor and control real and reactive power flows and voltage levels, and schedule and operate reactive power resources. The Applicants state that, although they will continue to physically operate their transmission systems, they will do so subject to GridSouth's overall direction.

The filing does not propose to consolidate the control areas of the three Applicants commencing with the date of operation but states that such consolidation might occur in the future. Applicants propose to retain operational control over their transmission assets

⁴⁴Transmittal letter at 39.

⁴⁵Response at 48.

and GridSouth will function similar to a control area operator over its region, initially through regional coordination of existing control areas.

2. Intervenors' Comments

Dynegy questions what transmission functions will be delegated to the transmission owners and whether the delegation would significantly impact ATC, congestion management, or reliability. Dynegy requests that the Commission direct GridSouth Applicants to provide more details on this delegation.

Calpine contends that the transfer of functional control of only the transmission assets ensures maintenance of the status quo and inhibits the development of a robust competitive wholesale market in a timely manner to serve new load growth. Citing Commonwealth Edison Company, 90 FERC ¶ 61,192 (2000) (Commonwealth), Industrial Consumers complain that GridSouth represents a "bad practice" deviating from minimum Characteristic 3 because transmission owners will retain operational control over bulk facilities.

AF&PA raises concerns about operational control over customer-owned, on-site generators connected to the RTO grid. AF&PA suggests that industrial generation should not be treated the same as merchant generation capacity because industrial generation may be the byproduct of an industrial process. AF&PA requests that the Commission find that industrial process generator must only be dispatched if the interconnection agreement permits it and must retain control over planned outage schedules.

3. GridSouth Applicants' Response

The Applicants respond that the proposed Operating Protocol provides GridSouth with sufficient operational independence and authority to satisfy Order No. 2000. They cite to section 1.3 of the Operating Protocol, which sets out fourteen general categories of functions and areas of responsibilities to be undertaken by GridSouth. Applicants explain that they have given GridSouth Functional Control over the transmission facilities and have authorized GridSouth to monitor, direct, review, advise and approve any Transmission Owners' actions. These functions, which are set out in detail in separate articles of the Protocol, include, but not limited to: GridSouth reviewing and approving requests for transmission service; calculating and posting on OASIS of Total Transfer Capability (TTC) and Available Transmission of Capacity (ATC); procuring ancillary services and establishing ancillary service requirements; approving scheduling of transmission facility maintenance; exercising functional control over transmission system in a nondiscriminatory manner; enforcing generation capacity requirements; determining when congestion is occurring and attempting to alleviate congestion; planning responsibility for

the entire GridSouth transmission system; and entering into agreements with generation owners, transmission customers and others. Finally, Applicants explain that GridSouth employees will be independent from any Market Participant and must not discriminate against any Market Participant or Transmission user.

4. Discussion

Applicant's proposed division of transmission functions meets the minimum requirements of Order No. 2000 and is provisionally accepted. In Order No. 2000 we said that, if any operations are delegated to entities other than the RTO, the RTO must have clear authority to direct all actions that affect the facilities under its control, and the system of operational control chosen must ensure reliable operation of the grid and non-discriminatory access to the grid by all market participants.⁴⁶ GridSouth will also have responsibilities as security coordinator (as defined in Commonwealth) and for short-term reliability (discussed below). Based on our review of the GridSouth functions and areas of responsibilities, we find that GridSouth will be able to direct all actions that affect the facilities under its control. We will rely on the description provided by the GridSouth Applicants regarding GridSouth's functional control. This reliance is subject to GridSouth performing the fourteen general categories of functions once it commences operation. No more details are necessary at this time.

With respect to AF&PA's concerns, we agree that there are differences in how particular types of generators should be dispatched within an RTO. Moreover, we agree that the interconnection agreement or other contractual arrangements between the transmission provider and the generator should be controlling. However, this issue is outside the scope of this proceeding and should be dealt with on an individual basis when the individual RTO interconnect filing is made.

RTO Characteristic No. 4: Short-Term Reliability

The RTO must have exclusive authority for maintaining the short-term reliability of the grid that it operates.

1. The GridSouth Applicants' Proposal

The Applicants state that GridSouth will operate under reliability standards established by NERC and regional reliability councils, and that GridSouth will have the authority to: (1) order the redispatch of generation in order to maintain firm transmission

⁴⁶Order No. 2000 at 31,091.

service using mandatory incremental and decremental bids provided by generators; (2) approve and disapprove requests for scheduled outages of transmission facilities needed for maintenance; (3) produce an annual transmission outage plan; (4) confirm and schedule interchange transactions; (5) obtain ancillary services; (6) act as the NERC security coordinator; (7) perform load flow and stability studies; (8) maintain system stability (including the ability to call for TLRs); and (9) enter into interconnection agreements with generators.

2. Discussion

Order No. 2000 requires that RTOs must have exclusive authority for: (1) receiving, confirming and implementing all interchange schedules; (2) redispatch authority for any generator connected to its transmission facilities if necessary for the reliable operation of these facilities; and (3) approval and disapproval of all requests for scheduled outages of transmission facilities to ensure that the outages can be accommodated within established reliability standards.⁴⁷ No intervenors challenge GridSouth's clear authority over dispatch of generation within its control area. Further, the Applicants' proposal gives GridSouth authority over scheduling, approving scheduled outages, and other reliability matters. Accordingly, we find that GridSouth meets the Short-Term Reliability requirements of Order No. 2000.

C. RTO Functions

RTO Function No. 1: Tariff Administration and Design

The RTO must administer its own transmission tariff and employ a transmission pricing system that will promote efficient use and expansion of transmission and generation facilities.

A. Non-Rate Issues

1. The GridSouth Applicants' Proposal

a. General

The Applicants state that GridSouth will be the sole provider of transmission service within its region and will provide interconnection service through its Tariff. Together with the Applicants, GridSouth will have unilateral authority under section 205 of the FPA to

⁴⁷Order No. 2000 at 31,104.

propose revisions to the rates, terms and conditions of the Tariff.⁴⁸ Under section 28.2 of the Tariff, transmission owners, on behalf of their native load customers, will be required to designate resources and loads in the same manner as any network customer. GridSouth will also be responsible for administering the grandfathered bilateral transmission contracts of transmission owners. The Applicants state that GridSouth will be responsible for calculating and posting ATC on the GridSouth OASIS, evaluating and accepting or rejecting requests for transmission service, and implementing re-dispatch and curtailment orders where necessary, including imposing and collecting congestion management charges.

Beginning on the date that GridSouth begins operations, it will administer its own Tariff which will set out the rates, terms and conditions under which GridSouth's transmission customers, including the Applicants, will obtain transmission service for wholesale transactions. GridSouth's Tariff is modeled after the Order No. 888 pro forma tariff. GridSouth requests the Commission's approval of the terms and conditions of GridSouth's Tariff under section 205 of the FPA.

b. Related to bundled retail load and grandfathered contracts

To comply with Order No. 2000, pursuant to Section 2.03 of the GridSouth Transmission Operating Agreement (TOA), Applicants have given functional control of all their transmission facilities to GridSouth.⁴⁹ Therefore, as the sole entity operating and controlling transmission facilities, GridSouth is, by definition, the only provider of transmission service over the grid it controls. This necessarily includes transmission service for all purposes, including transmission service used by the Applicants to serve their bundled retail customers. Prior to rate unbundling in an Applicant's retail jurisdiction, Section 2.09 (d) of the TOA reflects the reality that GridSouth will provide, subject to the terms and conditions of the GridSouth's OATT, the transmission service needed for each TOA Participant, including Applicants, to serve its bundled retail customers. Section 2.09 of the Tariff excuses TOA participants from paying for GridSouth facilities Participants use to serve their native load.⁵⁰ TOA participants recover the costs of these facilities as part of their revenue requirement in bundled retail rates. While the GridSouth Applicants make it clear that the bundled retail customers will continue to pay Applicants for transmission

⁴⁸See section 2.03 of the TOA.

⁴⁹Order No. 2000 at 31,090-91.

⁵⁰By TOA participants we mean the Applicants as well as any other transmission owners that transfer their facilities to GridSouth in the future.

service according to their existing bundled retail rates,⁵¹ section 2.09 of the TOA⁵² and section 34 of the OATT make it clear that the Applicants and other TOA Participants will be responsible for GridSouth's Transmission Service Charge (TSC), and net redispatch charges under Grid South's OATT Attachment K, Congestion Charges, as applicable to bundled retail customers.

Section 2.09 (e) of the TOA states that GridSouth will also provide the service needed to fulfill the obligations of bilateral transmission contracts executed prior to the date Order No. 888 became effective (called Grandfathered Contracts), but that the terms and conditions of these contracts will be honored. Similar to retail bundled service and subject to the same exclusions⁵³ as bundled retail load, the transmission component applicable to these Grandfathered Contracts are not subject to the charges collected by GridSouth.

Beginning on the date that GridSouth begins operations, service agreements under the Applicants' existing OATTs will be reassigned to service agreements under GridSouth's OATT.

2. Intervenors' Comments

a. Comments related to general issues

Joint Protestors complain about a number of provisions in the Tariff.⁵⁴ They complain that the GridSouth Applicants have not provided enough detail as to how Capacity Benefit Margin (CBM) will be determined. Joint Protestors request that the amount and sources of CBM and the methodology by which it will be determined be specified in the Tariff. Joint Protestors want the definition of Load Serving Entities to be modified so that

⁵¹Henderson testimony at page 8.

⁵²We also note that under Section 209(d), if any future TOA Participant does not operate a control area recognized by NERC, then that Participant's bundled retail service is also subject to Energy Imbalance Charges under Schedule 4 of the OATT. In addition, Section 209(d) and (e) erroneously refer to "Schedule" 4 of the OATT as "Section" 4. We hereby direct GridSouth to correct this error in its compliance filing.

⁵³ Applicable GridSouth charges to Grandfathered Contracts are TSC under Schedule 9, Congestion Charges under Schedule K, and Energy Imbalance Charges under Schedule 4.

⁵⁴See Joint Protesters pages 98-111.

generation and transmission cooperatives and joint municipal agencies would be included within the definition.

Joint Protestors believe that the definition for Non-Transferred Facilities may allow facilities that serve a transmission function to be withheld from transfer to GridSouth's functional control. They request that the Applicants provide a complete listing of the facilities that are to be transferred to the functional control of GridSouth. Joint Protestors assert that the definition of Transmission Owner in the Tariff should not require a Transmission Owner to have a reciprocity tariff on file with the Commission prior to transfer of the transmission facilities to GridSouth.

Joint Protestors argue that GridSouth's Tariff is discriminatory because it unreasonably bars entities other than initial members from being a pricing zone. In addition, Joint Protestors also claim that CP&L's western control area is surrounded by the Duke Pricing Zone in contradiction to one of the conditions regarding Pricing Zones.

Joint Protestors allege that a change in the pro forma Tariff may enable GridSouth to differentiate among transmission customers in setting applicable power factor requirements. They state that any transmission customer that is discriminated against should have the right to complain and, to the extent the proposed language limits a transmission customer's ability to obtain relief, such language should not be permitted. Joint Protestors also request that the Commission require GridSouth to restore explicit references concerning rights of a party to file a complaint with respect to this provision.

A number of intervenors complain that GridSouth's proposed modification of section 12.5 of its Tariff could eliminate the right to file a complaint which is expressly preserved under the pro forma Tariff.

Dynergy requests that the Commission provide guidance on how opportunity costs are to be calculated regarding the reassignment of transmission rights. Alternatively, Dynergy states that the Commission should permit entities with market-based rate authority to resell transmission rights at market-based rates.

b. Comments related to bundled retail load and grandfathered contracts

Intervenors argue that allowing bundled retail customers to continue to pay for transmission service according to their existing bundled rates violates the requirements that GridSouth be the sole provider of transmission service and perpetuates favorable treatment

of native load.⁵⁵ Interveners also allege that Grandfathered Contracts executed prior to Order No. 888 raise similar concerns. Generally, intervenors request that the Commission place all users of the transmission system under the Tariff on the same foundation and subject to the same rules.

Joint Protestors allege that the Applicants are proposing to abrogate transmission service agreements under their existing OATTs and force the affected customers to take service under GridSouth's less favorable Tariff.⁵⁶ Joint Protesters claim that a Network Demand (NCD) Service which CP&L had proposed in Docket No. EC00-55-000, has been effectively removed from GridSouth's Tariff. Dynegy also requests clarification of section 22.2 of the pro forma OATT. Dynegy states that certain transmission providers have limited or, in some cases, denied the ability of transmission customers to exercise their right to modify receipt and delivery points for firm service. Therefore, Dynegy requests that the Commission clarify "that RTOs must permit transmission customers to modify firm Receipt and Delivery Points, including modifications on a daily basis, and that redirecting a request does not affect the transmission customer's rollover status pursuant to Section 22.2 of the OATT."⁵⁷

3. GridSouth Applicants' Response

a. Related to general issues

Applicants respond that the requirement to post a CBM methodology need not be explicit in the Tariff. Applicants state that GridSouth plans to post its CBM methodology before operations begin and that GridSouth's actions will be subject to the Commission's review. Applicants state that they are willing to modify the definition of Load Serving Entities in the Tariff to include generation and transmission cooperatives and joint municipal agencies.

Applicants assert that Non-Transferred Facilities are those facilities over which GridSouth has no need to exercise control. They state that these facilities are distribution assets (such as step-down facilities for low voltage deliveries) not used to provide transmission service and that a separate charge for service over such facilities will be specified in the Service Agreement, and that affected customers will have the opportunity to raise concerns at that time.

⁵⁵Joint Protestors, EPSA, Dynegy, CUCA, EPMI and Coral.

⁵⁶Joint Protesters at 98.

⁵⁷ Dynegy at 20.

Applicants assert that the Pricing Zone criteria are primarily intended to prevent owners of isolated, non-integrated transmission facilities from setting up Pricing Zones and avoid paying their fair share of costs. They also state that CP&L's western control area is not surrounded by Duke due to its interconnections with American Electric Power Company and TVA, in addition to its interconnection with Duke.

The Applicants argue that Joint Protestors have misread the definition of Transmission Owner. They claim that the definition only requires that a transmission owner have a reciprocity tariff on file prior to the time that the transmission owner seeks membership in GridSouth.

b. Related to bundled retail load and grandfathered contracts

In their response, Applicants point out that the Commission grandfathered then-executed bilateral transmission agreements in Order No. 888 and that Order 2000 did not abrogate these contracts.⁵⁸ Applicants also underscore that, in Order No. 2000- A, the Commission explicitly confirmed that Order No. 2000 does not require the unbundling of the transmission component of bundled retail sales.

For customers with existing OATT Service Agreements, Applicants explain that those Service Agreements will be assigned to GridSouth and those customers will take service under GridSouth's Tariff. With respect to favorable terms and conditions in Applicants existing tariffs, Applicants note that, under section 14.2 of GridSouth's Tariff, long-term, point-to-point customers can designate secondary points of receipt and delivery that have priority over short-term, point-to-point and non-firm, point-to-point transmission service. Applicants state that the pro forma tariff does not require NCD Service. With respect to Dynegy's request for clarification about the application of Section 22.2 to specific transactions, Applicants do not believe that Dynegy's proposal comports with Commission policy.

4. Discussion

a. Discussion related to general issues

In an order addressing the methodology for computing the available transmission capability under Attachment C of the pro forma tariff, the Commission clarified that a transmission provider should post a narrative explanation of its CBM practices on its

⁵⁸GridSouth at 51-2.

OASIS.⁵⁹ GridSouth has not provided any details regarding its CBM practices. In its revised compliance filing, GridSouth should explain whether it will include CBM in its ATC calculations and, if so, explain how it will calculate CBM.

GridSouth's TOA section 2.03(b) provides that "in administering the OATT, GridSouth shall, together with the participants, have unilateral authority under Section 205 of the Federal Power Act to propose revisions to the rates (including ultimate authority over rate design), terms and conditions under the OATT..." Page 30 of the Applicants' transmittal letter states that "Section 203(b) provides for GridSouth to administer the OATT with authority under Section 205 of the FPA to propose changes in rates and terms..." Section 2.03(b) of the TOA does not comport with the description of section 205 rights given on page 30 of the transmittal letter. We will require the Applicants to amend section 203(b) consistent with its transmittal letter.

If GridSouth assesses a charge for direct assignment facilities, that charge will need to be filed in conjunction with service under the Tariff (i.e., when the specific service agreement is filed). We agree with the Applicants that affected customers would have the opportunity to raise concerns at that time.

GridSouth Applicants' proposed criteria for creating new Pricing Zones are reasonable. Under these criteria, a Transmission Owner must operate a NERC-recognized control area (or be a member of a Control Area power pool), the proposed Pricing Zone must not be surrounded by another Pricing Zone, the transmission facilities must be network responsive to changes in power flows, and the transmission facilities must materially contribute to the availability of additional ATC. These standards ensure that a transmission owner of sufficient size or capacity will still be able to create a Pricing Zone should it choose to do so.

We agree with Joint Protestors that the GridSouth Applicants should restore the explicit language concerning parties' rights to file a complaint. However, we strongly encourage parties to use the voluntary ADR procedures to resolve disputes prior to filing them with the Commission. GridSouth Applicants' change to the language concerning Power Factor requirements does not materially change the pro forma tariff. Moreover, Applicants' willingness to amend the provision to state that Transmission Owners would

⁵⁹Capacity Benefit Margin in Computing Available Transmission Capacity, 88 FERC ¶ 61,099 (1999).

abide by the requirements established by the Transmission Provider should relieve Joint Protestors' concerns.⁶⁰

We also agree with Joint Protestors that Applicants' requirement that a transmission owner have a reciprocity tariff on file with the Commission prior to joining GridSouth is unnecessary since a transmission owner that joins GridSouth will make its transmission facilities available pursuant to the terms of the GridSouth Tariff.⁶¹ Accordingly, Applicants are directed to remove this restriction.

Dynegy's request for guidance on how opportunity costs are to be calculated regarding the reassignment of transmission rights is beyond the scope of this proceeding as is its request that the Commission permit entities with market-based rate authority to resell transmission rights at market-based rates.

b. Discussion related to bundled retail load and grandfathered contracts

GridSouth will have control of all transmission facilities and will therefore be the sole provider of transmission service in its region. While GridSouth Applicants are correct that Order No. 2000 does not require that retail rates be unbundled, it does require that Applicants and other TOA Participants needing to meet their retail load be placed completely under the GridSouth OATT. In so doing, GridSouth will not assess TOA participants for those GridSouth charges which are based on TOA participants' own revenue requirement. As a result, Applicants have ensured that the charges assessed by GridSouth for TOA participants' use of the grid to meet their bundled retail load are no different than the transmission component of their bundled retail rates. Arrangements for TOA participants to compensate GridSouth for their use of GridSouth's facilities must be accomplished not by waiver, but by contract between GridSouth (the transmission provider) and TOA participants who are now the transmission customers. Accordingly, GridSouth is required to modify its proposal and codify its pricing to TOA participants. We will require that GridSouth Applicants make conforming changes to the GridSouth OATT as needed (e.g., Section 2.09 of TOA and Section 34 of the OATT).

⁶⁰Similarly, GridSouth's proposed change in definition of load serving entity alleviates Joint Protestors' concern.

⁶¹This does not alleviate the need for the filing of a reciprocity tariff if a non-jurisdictional transmission owner seeks transmission service on GridSouth prior to joining GridSouth.

As to the Grandfathered Contracts, Applicants are correct that Order No. 2000 did not generically abrogate existing transmission agreements. The Commission adopted a measured approach of allowing each RTO to propose whatever contract reform it concludes is necessary. Applicants state that they will finalize the list of Grandfathered Contracts 60 days prior to GridSouth's operation date, and we encourage the Applicants to negotiate appropriate contract reforms during the intervening time period.

With respect to the more favorable terms and conditions and abrogation of existing OATT Service Agreements, utilities are allowed to propose changes to their OATTs or, in this case, supersede them in their entirety. While Joint Protestors are correct that CP&L's merger with Florida Power Corporation resulted in the provision of NCD service through their tariff as a benefit of the merger, the benefits provided by the RTO are greater. An appropriate RTO should improve efficiencies in grid management through improved pricing, congestion management, more accurate estimates of ATC, improved parallel path flow management and more efficient planning among other benefits. We will not impose the provision of NCD service on GridSouth parties that were not part of the CP&L/FPC merger because such service is not required under the pro forma tariff.

Dynegy's request for clarification of Section 22.2 seeks interpretation of the pro forma tariff in light of the practices of certain transmission providers that are not parties to this filing. This is not the appropriate forum for Dynegy to raise issues about the application of the pro forma tariff to specific transactions that are not at issue here.

B. Transmission, Ancillary Services, and Transmission Service Charges

1. The GridSouth Applicants' Proposal

In this filing, the GridSouth Applicants have filed pro forma rates but are deferring filing a comprehensive pricing proposal until later. The Applicants state that, in the supplemental filing, they will propose incentive rates for new transmission construction and for reductions in the cost of transmission operations.

The GridSouth Tariff specifies a single access charge for transmission service over the facilities subject to GridSouth's Functional Control. The transmission system of each GridSouth participant will form a separate pricing zone within GridSouth and a transmission customer delivering power to a load located within a pricing zone pays a single license plate rate. Point-to-point transmission customers that take service through or out of GridSouth's region to serve loads outside GridSouth will pay a single rate based on the average of the Applicants' license plate rates weighted by each Applicant's investment in transmission facilities.

The Applicants also propose a formula rate to calculate the GridSouth Transmission Service Charge (TSC), which will enable GridSouth to recover its operating costs and the cost of capital associated with GridSouth investments. The TSC will be a surcharge to all transmission customers under the Tariff. The TSC will apply to all transmission customers for all loads, including the participants' use of the transmission system to serve bundled retail and grandfathered wholesale customers.

The Applicants state that they are contemplating (but not requesting) a five-year rate moratorium both on the level of certain rates and charges assessed by the Applicants to GridSouth under the TOA for use of the Applicants' transmission facilities, and on the corresponding rates and charges to wheeling customers under the GridSouth Tariff. While not seeking approval of actual rate levels, the Applicants state that they are seeking approval of the terms and conditions of the GridSouth Tariff and approval of the proposed license plate rate, ancillary services, and TSC pricing methodologies. They state that they are not seeking approval for incentive rates at this time nor for the proposed rate moratorium.

2. Intervenors' Comments

A number of intervenors state that, since the Applicants will submit a complete pricing proposal later, it would be premature for the Commission to make any findings until that submission is filed.⁶² Others, such as SC Consumer Advocate, make general comments regarding GridSouth's rates and reserve the right to comment fully when the Applicants file their complete pricing proposal.

CUCA, SMI, and NC and SC Municipalities believe that, since GridSouth will take over transmission-related functions, tasks and operational control, a rate moratorium will lead to the over-recovery of costs because the Applicants' costs for providing transmission service should decrease. SMI Steel believes that use of the proposed license plate rates in conjunction with the proposed TSC will lead to the over recovery of costs. CUCA adds that, before the Applicants can impose a moratorium, they must provide a cost-benefit analysis, including rate impacts, detailed explanations as to why the proposed rate treatment is appropriate and also support any rate proposal as just and reasonable. CUCA also objects that the Applicants will not be subject to many of the Tariff charges when serving bundled retail load.

EPSA contends that GridSouth's provision of transmission service to native load customers at pre-existing bundled rates without the separate TSC will not provide comparability to all users of the transmission system. EPSA claims that generators

⁶²See, for example, Williams at 15 and SMI Steel at 13.

planning to develop merchant projects are disadvantaged in reserving transmission capacity since they typically cannot identify customers before they build their facilities and make the necessary reservation of point-to-point or network service. EPSA asserts that, unlike independent power producers, Applicants are able to reserve transmission capacity for future resources and to accommodate load growth. EPSA urges the Commission to require that GridSouth's Tariff provide a level playing field with respect to the reservation of transmission capacity.

3. The GridSouth Applicants' Response

The Applicants respond that they have not filed for approval of specific rate levels or the propriety of a rate moratorium but that they only seek approval of the methodologies for calculating the proposed license-plate rate and ancillary service charges. They assert that intervenors who claim that a rate moratorium will lead to the over-recovery of costs have not provided any support for their claim.

With regard to the TSC, the Applicants state that they are seeking approval of the "TSC concept", *i.e.*, that GridSouth will recover its operating costs from transmission customers, but not the actual formula for calculating the TSC. They add that the design of the TSC is being reviewed by the Applicants and will be affected by their consideration of incentive rates.

The Applicants clarify that the rate levels in the filing were included to show what the rates would be based on the current revenue requirements of each Applicant. They state that there are a number of rate-related issues on which guidance should be provided as well as rate-related terms and conditions filed pursuant to section 205 whose reasonableness will not be affected by the supplemental rate filing.

4. Discussion

To the extent that Applicants seek guidance on the proposed rate methodologies, we note that the proposed license plate rate structure is in place for each of the Applicants in their currently effective OATTs. Applicants' proposal to base GridSouth's region-wide transmission rate on the weighted average of the Applicants' transmission rates is in turn reasonable. In addition, GridSouth's use of a license plate rate structure eliminates pancaked rates as Order No. 2000 requires. Similarly, the proposed ancillary services rate methodologies, except for the Energy Imbalance Service, are also based on methodologies currently on file for the Applicants in their OATTs. As such, except for Energy Imbalance Service, the proposed ancillary services rate methodologies are reasonable. With respect to the TSC, it is reasonable for GridSouth to recover its operating costs from all transmission customers through this type of service charge.

In the October 16, 2000 filing, Applicants state that they intend to make a supplemental filing which will constitute a comprehensive rate proposal including incentive rates under Section 205 of the FPA. Since Applicants' supplemental filing represents their formal section 205 filing regarding rates, we believe that it is premature to rule on any of the rate requests in the present proceeding. Given the conditions in this order, particularly with regard to expansion of scope to include other public utilities, any incentive rate proposal proffered by GridSouth Applicants will be subject to their compliance with this order and our RTO regulations, 18 C.F.R § 35.34(e) (2000).⁶³ Accordingly, we will address Applicants' proposed rates, including incentive rates, in the supplemental filing.

RTO Function No. 2: Congestion Management

The RTO must ensure the development and operation of market mechanisms to manage transmission congestion. The RTO must satisfy the market mechanism requirement no later than one year after it commences initial operation. However, it must have in place at the time of initial operation an effective protocol for managing congestion.

1. The GridSouth Applicants' Proposal

The Applicants state that GridSouth will initially manage transmission congestion by arranging for the redispatch of generation. GridSouth will maintain existing firm transmission service through the use of incremental and decremental bids that generation owners are required to submit. Load serving entities (LSEs) may submit bids as well. The cost of this redispatch will be shared among firm transmission service customers who are using the congested transmission path and allocated to each customer in proportion to the customer's load impact on the congested path. Further, according to the proposal, the RTO will facilitate generation redispatch that might be needed to support requests for new transmission service. Transmission customers would pay the generation owners directly for such service. Must-run units will be compensated based on Commission-approved rates, and the costs incurred by GridSouth for must-run service will be allocated on a pro-rata basis among network service, native load and firm point-to-point transmission service customers serving load within the GridSouth control area. GridSouth states that it will make a supplemental filing prior to the start-up date setting forth the detailed procedures and rules for its congestion management proposal. GridSouth does not believe that it would be appropriate at this time to develop a more extensive, real-time locational pricing market because: (a) the cost does not justify the benefits; (b) the complexity requires extended study; (c) there is little congestion in the GridSouth control area; and (d)

⁶³See Southern Companies Services, Inc., 9_FERC ¶ 61,___ (2001), issued concurrent with this order.

developing such a market mechanism is best led by the independent GridSouth RTO as opposed to including a market design in the proposal to form GridSouth.

GridSouth Applicants state that their proposal does not bind them to the Order No. 2000 requirement regarding a market-driven congestion management methodology within a year of initial operation.⁶⁴ Instead, at that time, Applicants will file to "establish a process to address the issue" of a market-based mechanism for congestion management.

2. Intervenor's Comments

Joint Protestors state that the proposal that GridSouth would assess congestion costs to firm transmission customers based on GridSouth's assessment of the relative load impacts on the congested path is ambiguous and may be an attempt to exempt GridSouth's native load customers from exposure to congestion costs. Joint Protestors also protest that must-run costs related to the operation of CP&L's western control area on its bifurcated system will unfairly be spread over all firm loads within GridSouth.

3. The GridSouth Applicants' Response

Applicants respond that a subsequent filing will detail the congestion management procedures but explain that GridSouth will use distribution factors to model the loadings on the transmission system and to allocate the costs to firm customers within control areas and across control areas. For example, if the distribution factors indicate that a party is responsible for 10% of the congestion on a path, it would pay 10% of that path's congestion costs. Also, Applicants state that the proposed TOA requires that CP&L, Duke and SCE&G be responsible for their allocated congestion costs incurred in connection with providing their respective bundled retail electric service. Finally, Applicants state that must-run costs are allocated to customers within the control area. Therefore, any must-run costs incurred in the CP&L western control area will be allocated to CP&L and other firm transmission customers serving load in that control area and are not spread over all firm loads within GridSouth.

4. Discussion

We will accept Applicants' instant proposal as satisfying the interim congestion management function, subject to further review when Applicants makes their supplemental filing to detail the congestion management rules and procedures. If the intervenors' concerns have not been addressed, they may raise them again at that time. However, we are not relieving GridSouth of its responsibility pursuant to Order No. 2000 that RTOs satisfy

⁶⁴Order No. 2000 at 31,126-28.

the market mechanism requirement of congestion management no later than one year after commencing initial operation. We stress the need for GridSouth to cooperate with all market participants and neighboring RTOs in designing its final market mechanism congestion plan proposal.

RTO Function No. 3: Parallel Path Flow

The RTO must develop and implement procedures to address parallel path flow issues within its region and with other regions. The RTO must satisfy this requirement with respect to coordination with other regions no later than three years after it commences initial operation.

1. The GridSouth Applicants' Proposal

GridSouth intends to internalize parallel path flows within its region. The Applicants state that, where the parallel flows can be identified, GridSouth will include them in the ATC calculations. As required under Order No. 2000, GridSouth's Operating Protocol provides that it will develop and implement procedures to address parallel path flow issues with other regions.

2. Intervenors' Comments

Joint Protestors claim that GridSouth has failed to show that the configuration of GridSouth will internalize significant transmission loop flows in the region as a whole.

3. Discussion

Order No. 2000 requires that the RTO must develop and implement procedures to address parallel path flow issues within its region and with other regions no later than three years after it commences initial operation.⁶⁵ GridSouth's application states that it will have such procedures in place within the specified time period. Accordingly, GridSouth meets the minimum requirements of this function.

RTO Function No. 4: Ancillary Services

The RTO must serve as a provider of last resort of all ancillary services required by Order No. 888 and subsequent orders.

⁶⁵Order No. 2000 at 31,130.

1. The GridSouth Applicants' Proposal

The Applicants state that GridSouth will provide ancillary services under the Tariff and will serve as the ancillary services provider of last resort. Transmission customers will have the option of acquiring their own ancillary services (other than scheduling and reactive power under Tariff Schedules 1 and 2). GridSouth will have the authority to decide the minimum required amounts of ancillary services and, if necessary, the locations at which these services must be provided. Applicants propose a penalty to those customers whose self-supplied ancillary services are inadequate.

With respect to Energy Imbalance Service (Schedule 4 of the OATT), Applicants state that GridSouth will operate a market in which hourly energy imbalances for either energy or load may be traded within the same GridSouth Pricing Zone. Schedule 4 provides for a trading window during which customers can trade their imbalances. Any untraded imbalances that remain after the close of the trading window will be settled with GridSouth based on an Hourly Imbalance Cost (HIC) index. GridSouth will base the HIC on one or more independently prepared regional price indices. Applicants state that GridSouth will choose the price indices. Applicants acknowledge that the proposal represents only a first step towards the Commission's objective of creating a real-time energy imbalance market within each RTO. Applicants state that Section 204(c) of the TOA requires GridSouth to begin the process of designing a market-based imbalance energy proposal, with stakeholder input, within one year of the independence date.

2. Intervenors' Comments

Williams argues that GridSouth's OATT does not allow customers to self provide reactive power. Santee Cooper argues that Applicants' proposed energy imbalance settlement system gives an incentive to deliberately under-schedule. Specifically, Santee Cooper states that while there is a penalty for over-scheduling, there is no penalty for under-scheduling. SMI-Steel argues that the penalty for over-scheduling is unnecessarily punitive and discriminatory for variable load customers.

Joint Protestors object to the use of price indices for determining the HIC. They argue that since all imbalance energy that is not otherwise traded is priced at a market index rate, rather than by demand and supply side bidding, there is no real market. In addition, they argue that it is not clear that the HIC will accurately reflect energy costs in the regions and that it is likely to exceed Applicants' generation costs. SMI Steel notes that it is unclear how the HIC will be calculated. Joint Protestors also argue that customers have no recourse if there is a discrepancy over whether the level of self-supplied ancillary services (spinning and supplemental reserves) was actually inadequate or if any associated penalties are too harsh.

SMI Steel adds that under the Applicants' proposal, energy imbalances can only be traded with control areas. They argue that imbalance energy should be tradable throughout the GridSouth region. They also argue that the settlement period for trading imbalances should be longer than the two days proposed by Applicants.

Joint Protestors argue that certain provisions of Schedule 5 and Schedule 6 of the OATT are discriminatory. Specifically, they argue that Customers who purchase ancillary services from GridSouth will not be subject to the energy imbalance penalty surcharges to which Transmission Customers who self-provide those services are subject. In addition, SMI Steel argues that Schedule 5 and Schedule 6 of the OATT contain notification requirements and penalties that are not included in SCE&G's current OATT.

3. The GridSouth Applicants' Response

Applicants respond that the GridSouth OATT is based upon the Commission's pro forma Schedule 2, which does allow customers to self supply reactive power but requires that it be specified in the transmission customer's service agreement. Therefore, they conclude that while it is true that customers cannot self-provide all of their reactive power, consistent with Order No. 888-A, they can self-provide some reactive power. With regard to energy imbalance settlement, Applicants respond that Section 4.5.3 of the OATT does provide penalties for under-scheduling, so there is no increased incentive to under-schedule.

Applicants respond to Joint Protestors that the HIC will be based on market prices that are derived from demand and supply bids and that the true cost of imbalance is reflected in the market price rather than in generation costs. Further, Applicants respond that the penalties are designed to compensate GridSouth for the ancillary services that the customer failed to provide. In addition, they argue that there is some recourse for customers who are penalized. Customers can reduce the penalty by showing that they did self-supply sufficient levels of ancillary services for some portion of the month in question.

Regarding energy imbalance penalty surcharges, Applicants explain that the energy imbalance penalty would only apply in the case where GridSouth would be forced to supply "bridge energy" to cover the period between the time the service is needed and the time the Customer's self-supplied service begins. If the Customer purchases the ancillary services from GridSouth, there would be no need for "bridge energy", since there would be no interim period. Therefore, Applicants conclude, there would be no need to impose a surcharge if the Customer purchases its Schedule 5 and Schedule 6 ancillary services from GridSouth.

4. Discussion

Applicants' proposal for GridSouth to serve as the supplier of last resort for all ancillary services is consistent with the requirements of Order No. 2000.⁶⁶ However, Applicants' commitment to begin the process of designing a market-based imbalance energy proposal within one year of the independence date does not comply with Order No. 2000.⁶⁷ Accordingly, Applicants must make a filing with the Commission describing how GridSouth will implement market mechanisms for real-time energy balancing within one year of the independence date.

We reject Williams' argument that GridSouth's OATT does not allow customers to self-provide reactive power. As Applicants explained in their response, the pro forma tariff allows customers to self-supply a portion of their reactive power under certain conditions.⁶⁸ We also reject the argument that the process for determining whether self-supplied Schedule 5 and Schedule 6 ancillary services are adequate and assigning associated penalties offers customers no recourse. Transmission customers know the level of required reserves in advance so there should be little question regarding the adequacy. In addition, Section 5.2 of the OATT provides Customers with recourse if they disagree with GridSouth's application of penalties. We also reject the argument that GridSouth's energy imbalance surcharge penalty is discriminatory. Applicants have explained why the penalty would only apply in the case of Schedule 5 or Schedule 6 ancillary services that are self-provided or purchased from a third party.

We will address issues regarding the Hourly Imbalance Charge when we review Applicants' amended Schedule 4 which they have committed to file when they select a suitable index or indices. Likewise, we will address other issues regarding ancillary service and imbalance energy rates when we review Applicants' filing regarding the establishment of real-time imbalance energy markets in order to comply with Order 2000.

RTO Function No. 5: OASIS, Total Transmission Capability (TTC) and Available Transmission Capability (ATC)

The RTO must be the single OASIS site administrator for all transmission facilities under its control and independently calculate TTC and ATC.

⁶⁶Order No. 2000 at 31,140-41.

⁶⁷Order No. 2000 at 31,142, Order No. 2000-A at 31,378.

⁶⁸Order No. 888-A, Regulations Preambles, July 1996-December 2000, ¶ 31,048 at 30,228.

1. The GridSouth Applicants' Proposal

Applicants state that GridSouth will operate a single OASIS site to receive and process all transmission service requests. Applicants state that GridSouth will independently calculate ATC and TTC. Applicants explain that GridSouth will calculate ATC and coordinate ATC calculation with neighboring systems.

2. Intervenors' Comments

Joint Protestors express concern that GridSouth will need to rely on transmission owners for ratings of equipment and request that the Commission require GridSouth to independently verify equipment ratings and have a quick mechanism to verify disputes over ATC calculations.

3. The GridSouth Applicants' Response

Applicants state that transmission owners should provide the ratings, but they do not object to providing GridSouth authority to verify equipment ratings and conduct dispute resolution proceedings if necessary.

4. Discussion

GridSouth will operate a single OASIS site to receive and process all transmission service requests and independently calculate ATC and TTC. Therefore, we find that Applicants' proposal complies with RTO Function No. 5. We agree with Joint Protestors that GridSouth should have authority to verify equipment ratings and resolve disputes over ATC calculations. We direct Applicants to file their procedure for verifying equipment ratings and resolving disputes over ATC calculations

RTO Function No. 6: Market Monitoring

To ensure that the RTO provides reliable, efficient and not unduly discriminatory transmission service, the RTO must provide for objective monitoring of markets it operates or administers to identify market design flaws, market power abuses and opportunities for efficiency improvements, and propose appropriate actions.

1. The GridSouth Applicants' Proposal

An independent market monitor will be selected by the SAC from candidates identified by the GridSouth Board and will serve a three-year term. The market monitor may resign at any time or be removed for cause by the Board. The Board may also remove

the market monitor if it decides to utilize an inter-regional market monitor that would monitor the performance of multiple neighboring RTOs. Notification of the selection and removal of the market monitor will be filed with the Commission. The market monitor's functions include (i) identifying abuses of market power and undue discrimination in the GridSouth markets; (ii) monitoring the compliance with GridSouth's standards, practices and rules as established in the Tariff; (iii) determining design flaws in the service markets; (iv) collecting information and preparing reports for the Board, SAC, market participants and governmental authorities that are subject to review and comments; and (v) preparing the independence audit required by 18 C.F.R. § 35.34 (j)(1)(iv)(A).

Any party may submit information or make a complaint to the market monitor on any matter on a confidential basis. When the market monitor identifies misconduct involving these areas it may report the conduct to the Board and make recommendations for corrective action. The market monitor has no authority to impose penalties or sanctions on any market participant or change the rates, terms or conditions of any services. It is also responsible for developing an information gathering system and criteria for evaluation that permits it to monitor the GridSouth markets for market power, discrimination and design flaws. GridSouth has not yet filed the proposed market monitor information gathering system. The market monitor will maintain confidentiality on all data and documents as requested by the submitting party. If it is subsequently required by law to disclose any confidential material it will notify the affected party of the requirement and terms. Finally, the LLC Agreement permits a Commission-approved Inter-RTO market monitor to succeed the GridSouth market monitor.

2. Intervenors' Comments

Several intervenors question the selection/removal process for the market monitor. They argue that the proposed process compromises the independence of the market monitor because (1) the SAC will choose the market monitor from a list of candidates selected by a Board chosen by the applicant utilities, and (2) the Board may terminate the market monitor with no Commission or third party review of that decision. Others state that termination "for cause" is vague and subject to abuse. They argue that the SAC should have input when the Board chooses the initial list of candidates and any dismissal of the monitor should be subject to an internal review process and the opportunity to appeal to the Commission.

Numerous intervenors filed comments on the market monitor's ability to correct any market abuse, design flaw or compliance problems. Some intervenors state that the ability is practically non-existent due to its lack of enforcement authority. Others want the Commission and/or GridSouth to clarify the monitor's authorization to recommend penalties and sanctions to the Board or seek assistance and the remedies of federal

government agencies and courts. On the other hand, other intervenors argue that existing federal laws and the Commission offer sufficient protection against market abuses and oppose any grant of sanction, enforcement or punishment authority to market monitoring committees.

In regard to information gathering, intervenors ask for clarification with respect to what extent the market monitor will have access to data and information in the control of the utilities and by what authority the monitor will obtain necessary data. Also, they question whether any entities will be able to unduly influence market monitoring reports by their ability to review and comment on them. Other issues raised include: (1) the confidentiality requirements are overly broad and documents should not be presumed confidential unless indicated otherwise and justified; (2) the market monitor may not be the impartial party to perform the independence audit due to its financial ties to the Board; (3) the ability to impartially monitor the Board will be hindered by the Board's ability to control the monitor's budget; and (4) due to the complexity of the task, the market monitor should be established well in advance of the start-up date.

3. The GridSouth Applicants' Response

Applicants deny that the independence of the market monitor will be compromised by the selection and removal provisions. They state that the Board is comprised, by definition, of persons that have no connection to any market participant and will be a disinterested party, unlike the SAC. Also, the term "for cause" is clearly defined in the Master Definition List. Further, a market participant can always appeal to the Commission on any matter including the selection and removal of a market monitor. In discussing the powers of the market monitor, Applicants respond that the role of a market monitor under Order No. 2000 is to identify market power abuses, discrimination and market design flaws but not to rectify these problems. They claim that Order No. 2000 did not mandate that the market monitor be granted the authority to impose penalties or sanctions but only that penalties or sanctions may be appropriate for certain actions. Thus, they state that the market monitor is authorized to recommend penalties and sanctions but not authorized to impose them. Further, Applicants respond that their proposal is consistent with other market monitoring plans that have received Commission approval (e.g., PJM, Entergy, RTO West and Southwest Power Pool).

Applicants state that the market monitor will be authorized to access data and information because each transmission customer/market participant will sign a service agreement that will obligate it to abide by the terms of the GridSouth Tariff, which includes the market monitoring protocol. The GridSouth Board will also ensure that GridSouth cooperates with the monitor. Also, Applicants state that the review and comment function of market monitoring reports will not lead to undue influence because the monitor does not

have to incorporate any comments it receives on its reports and the regulatory authorities will make the reports public. Applicants deny that the confidentiality requirements are overbroad because (a) they are modeled on requirements already accepted by the Commission; and (b) they adopt the same presumption of confidentiality as employed by the Commission; namely that the party may get confidentiality treatment when requested but must defend that position against a legitimate request for disclosure. Also, the market monitor will file confidential information with agencies in accordance with the agencies rules and regulations.

Applicants claim that the market monitor will be a qualified party to perform the independence audit because it is nominated by an independent Board and selected by the SAC and, therefore, not affiliated with the RTO or transmission facility owners that are members of the RTO. They state that the Board does not control the monitor's budget. The market monitor submits a budget that must be approved by the Board and the SAC. If they cannot agree, the Board's decision would govern, unless overruled by a two-thirds vote of the SAC, in which case the SAC would govern. Finally, Applicants argue that the market monitor cannot be established prior to the start-up date since the Board, which selects the list of candidates, does not become functional before that date.

4. Discussion

Order No. 2000 requires that the RTO provide for objective monitoring of markets it operates or administers. Order No. 2000 permits, but does not require, the market monitor to be independent of the RTO. Here, Applicants have proposed an independent market monitor that, in addition to market monitoring, will have the function of preparing the independence audit, which is required to be performed by an independent entity.⁶⁹ Intervenor's argue that the Applicant's proposed process compromises the independence of the market monitor because the Board chooses the initial list of candidates and the Board is chosen by the applicant utilities. We disagree. Board membership is limited to persons who are not directors, agents, officers or employees of any market participant and have no financial interest in any transaction involving any market participant. Thus, the Board is truly independent of any market participant and would have no hidden agenda in selecting a list of candidates for selection by the SAC. Nor do we agree that the phrase "termination for cause" is ambiguous and subject to abuse. As GridSouth Applicants state, the term "cause" is clearly defined in the Master Definition List.⁷⁰

⁶⁹Order No. 2000 at 31,067.

⁷⁰The Master Definition List defines "cause" to mean a "Person's (a) material failure, whether willful, intentional or negligent, to perform substantially his or her duties; (b) (continued...)

Order No. 2000 stated that penalties and sanctions may be appropriate for certain actions and any proposed sanctions or penalties must be clearly identified in the market monitoring plan, as well as the specific conduct to which they would be applied, the rationale to support the sanctions and an explanation as to how they would be applied. But Order No. 2000 did not require that the market monitor have the authority to impose penalties and sanctions. The proposal authorizes the market monitor to recommend penalties and sanctions and any corrections will be made by GridSouth based on rulings from the Commission or any other appropriate regulatory authorities.

As to intervenor comments regarding issues related to data and information access and gathering, we will defer these issues until GridSouth files the market monitor information gathering system with the Commission. We do not believe that the confidentiality requirements are overly broad. Parties must justify any confidentiality claim against a request for disclosure. Section 4.3 of the Market Monitoring Protocol requires the market monitor, prior to making a disclosure of confidential material, to notify a market participant if confidential material is requested in the course of administrative or judicial proceedings. The market participant or GridSouth may then challenge such disclosure. We recently discussed the issue of market monitoring and confidentiality in PJM Interconnection, L.L.C., 93 FERC ¶ 61,269 at 61,868-69 (2000), and directed PJM to include language in its tariff that states how information provided by PJM will be treated and how information provided by others will be handled. The GridSouth Applicants should revise their filing to include language that comports with the PJM order.

Further, having verified the independence of the market monitor above, we see no reason that the market monitor cannot be impartial when performing the independence audit of GridSouth. Nor do we believe that the Board has sufficient power over the market monitor's budget to hinder its ability to monitor the Board's management of the RTO-run markets. The market monitor, not the Board, submits a budget and presumably will include enough to fund all of its monitoring activities. Finally, we agree that the market monitor cannot be established prior to the start-up date because the Board will not exist before that date.

⁷⁰(...continued)

dishonesty in the performance of such Person's duties; (c) conviction or confession . . . of a felony . . . ; (d) any willful act or omission on such Persons' part that is materially injurious to the financial condition or business reputation of the Company or any of its subsidiaries; (e) breach of any duty or obligation of noncompetition or confidentiality owed by such Person to the Company or any of its subsidiaries; or (f) breach on any provision or covenant contained in any employment or consulting agreement between such Person and the Company or any of its subsidiaries."

In Order No. 2000, the Commission did not prescribe a particular market monitoring plan, or the specific elements of such a plan, because market monitoring is evolving as trading markets are created. The Commission provided for a flexible approach and noted that different market monitoring plans may be appropriate for different RTOs.⁷¹ In addition, the Commission stated that it would periodically assess the need for, and the degree of market monitoring that should be done.⁷² In this proceeding, we accept GridSouth's market monitoring plan with the understanding that the Commission will periodically assess the need for, and degree of market monitoring; and hereby reserve our authority to issue a supplemental order regarding market monitoring.

RTO Function No. 7: Planning and Expansion

The RTO must be responsible for planning and for directing or arranging necessary transmission expansions, additions and upgrades that will enable it to provide efficient, reliable and non-discriminatory transmission service and coordinate such efforts with the appropriate state authorities. If the RTO is unable to satisfy this requirement when it commences operations, it must file with the Commission a plan with specified milestones that will ensure that it meets this requirement no later than three years after initial operation.

1. The GridSouth Applicants' Proposal

The Planning Protocol (Attachment P to the OATT) describes the framework and process for GridSouth's transmission planning and expansion. GridSouth will be responsible for coordinating development, annual updating and issuance of the regional transmission plan based on inputs from transmission owners and stakeholders, subject to the approval of relevant governmental authorities. The transmission owners will each develop expansion plans for their transmission facilities but GridSouth will have final responsibility for the regional plan. The planning process will be coordinated through the Reliability Planning Committee, which will be chaired by GridSouth and comprised of GridSouth staff and transmission owners. The Reliability Planning Committee will establish procedures, standards and requirements associated with the regional transmission planning process and will perform joint studies with the transmission owners subject to review and comment by directly affected parties. The Reliability Planning Committee will accomplish its responsibilities through working sub-committees chaired by GridSouth and comprised of transmission owners and invited stakeholders.

⁷¹Order No. 2000 at 31,155-56.

⁷²Id. at 31,380.

GridSouth shall only withhold authorization of the transmission owners' plans in the event studies show that the planned facilities will have a detrimental effect on grid reliability or will have an adverse impact which exceeds the benefits produced by the planned facilities. Draft transmission plans will be communicated to stakeholders and the Stakeholder Advisory Committee may comment on the plans. Following comments, GridSouth may conduct additional studies or direct transmission owners to conduct further evaluation. The alternative dispute resolution process set forth in the OATT is the means to resolve conflicts involving the regional transmission plan.

Transmission owners will have the right of first refusal to build new transmission facilities within their own service territories. If an owner chooses not to build, GridSouth may decide to build the project itself or seek alternative arrangements. If GridSouth cannot arrange for financing of any new investment, the transmission owner will be obligated to build the project, subject to a finding by FERC that the particular project is needed for reliability. The transmission owners will continue to be responsible for planning their systems to serve their native load customers.

2. Intervenors' Comments

Many intervenors argue that the transmission owners play too great a role in the transmission planning process. Joint Protestors, SC Consumer Advocate, EPSA, SMI Steel, Santee Cooper and Williams allege that GridSouth's role in the planning process is that of a passive coordinator or reviewer since the regional plan which is GridSouth's responsibility is based on the plans and studies of transmission owners. They complain that the actual studies and plans are to be developed, priced and evaluated by the transmission owners. They also express concern that non-transmission owning stakeholders will have only a review and comment function and may not participate on the Reliability Planning Committee which is comprised only of GridSouth and the transmission owners and which has direct responsibility over transmission planning. Santee Cooper further argues that the planning process is not sufficiently transparent to provide all stakeholders with sufficient information to participate intelligently on planning issues. It contends that Reliability Planning Committee meetings should be open to all stakeholders, with agendas posted in advance on OASIS. SC Consumer Advocate and SMI Steel want assurances that transmission planning and decisionmaking will reside in GridSouth.

Joint Protestors argue that under the Applicants' proposed OATT, planning for a substantial portion of the transmission network would remain under the control of the transmission owners rather than GridSouth. Joint Protestors point to the provision of the Planning Protocol allowing the continuation of transmission owner planning for systems serving native load customers. Joint Protestors note that the integrated transmission

network cannot be segmented into facilities that serve native load and those that serve other functions.

In addition, Joint Protestors, SC Consumer Advocate and Williams state that GridSouth can only overrule the transmission planning of transmission owners if studies show that the planned facilities will have a detrimental effect on grid reliability or cause an adverse impact which exceeds the benefits of the planned facility. Therefore, Joint Protestors and Williams assert that GridSouth must approve the transmission owner's planned facilities even if a lower cost option exists. SC Consumer Advocate notes that all GridSouth transmission owners are involved in wholesale generation and, therefore, may recommend low-cost transmission options for their own generation and high-priced transmission for competing generation since they have a vested interest in what competing generators pay for transmission access. Williams contends that if transmission owners disagree with GridSouth's planning decision, dispute resolution procedures should be adequate.

Dynegy requests that the Commission consider whether the Planning Protocol ensures the planning needs of the region as opposed to the needs of just the transmission owners. Dynegy notes Applicants have not filed a planning implementation plan.

Industrial Consumers and Williams state that GridSouth must have sole authority over generation interconnection policies and not transmission owners who may discriminate against competitors. Industrial Consumers state that there should be no piecemeal planning by transmission owners because that places too much reliance on coordinating or rationalizing the results. EPSA states that questions are raised as to whether generators will have to renegotiate existing interconnection agreements. Calpine believes that a separate, independent non-profit Southeast regional umbrella organization rather than GridSouth should have decisionmaking authority over new generator interconnections.

Various protestors further challenge section 2.08 of the TOA and section 2.8 of Attachment P to the OATT. They question granting each existing participant in the TOA the right of first refusal in connection with taking on the responsibility to expand the transmission system within its service territory, without regard to the cost, the quality or the timing of the participant's proposed installation. These protestors see this as precluding market motivated solutions that could lead to new entities offering potentially superior transmission installations for the overall benefit of the GridSouth RTO and the expansion of the entities participating in the GridSouth RTO.

3. The GridSouth Applicants' Response

The Applicants argue that the Planning Protocol gives GridSouth ultimate decisional authority over the transmission planning process, thus ensuring that transmission planning is appropriately independent from the transmission owners. Because planning a transmission grid is very complex, the Applicants state that GridSouth will not be in a position to take over complete responsibility for transmission planning at start-up. However, it is anticipated that GridSouth will have a significant planning staff that likely will perform ATC calculations, system impact studies, interconnection arrangements and will be responsible for final approval of all plans of the transmission owners. The Applicants contend that as long as transmission owners have a statutory obligation to serve native load they cannot escape the responsibility to plan their systems to serve those customers. The Applicants argue that the creation of an RTO under Order No. 2000 does not affect the obligation to plan for native load. According to the Applicants, transmission owners will not unduly influence planning decisions since GridSouth has the only decisional role. The Applicants state that GridSouth retains the authority to decide what constitutes a detrimental effect on grid reliability or an adverse impact which exceeds the benefits produced by planned facilities of transmission owners. The Applicants indicate that the Reliability Planning Committee has an advisory, rather than a voting role, and will fulfill its responsibility through ad hoc working groups which may include other stakeholders.

The Applicants contend that non-transmission owning stakeholders provide significant input into the planning process, including review and comment of draft plans, annual submissions of load forecasts and plans for new delivery points, participation in working sub-committees to address individual projects and, if disputes cannot be resolved, participation in the alternative dispute resolution process. The Applicants believe that a right of first refusal for transmission owners to build facilities is appropriate since transmission owners have a statutory duty to serve their native load and transmission owners have some two billion dollars of transmission investment. The Applicants acknowledge that the Planning Protocol does not contain specific generator interconnection procedures and will file such procedures in the near future.

4. Discussion

We find that the GridSouth Applicants' proposed transmission planning process as outlined in the Planning Protocol appended as attachment P to the open access

transmission tariff and as conditioned below, complies with Order No. 2000.⁷³ Many intervenors complain that GridSouth's role in the transmission planning process is too passive and that too much control is given to the three individual transmission owners. The intervenors point to the plans and studies performed by the transmission owners, the presence of the transmission owners on the Reliability Planning Committee and language which a number of Intervenor claims limits the ability of GridSouth to reject plans offered by the transmission owners. We share these concerns and require the GridSouth Applicants to modify the Planning Protocol as directed below.

Under the Planning Protocol, GridSouth is not simply the compiler of individual transmission plans as suggested by some intervenors. It is the coordinator and final decisional authority that approves the plans or requires that changes be made. As GridSouth clarifies in its answer, the transmission owners, while members of the Reliability Planning Committee, do not have any decisional role in the planning process. They serve only as technical advisors, albeit advisors with the unique and necessary knowledge and expertise concerning their transmission systems. GridSouth is the sole and final decision-maker and will have its own significant planning staff. This contrasts with the situation in ISO New England, 91 FERC ¶ 61,311 at 62,076 (2000), where the transmission owners had voting rights over planning decisions and we directed the ISO to eliminate the decisional role of the transmission owners. In the circumstances presented here, we do not believe that the transmission owners will have undue influence over the planning decisions to favor their competitive interests. Furthermore, as Applicants confirm in their answer, non-transmission owning stakeholders may also serve in an advisory capacity through working subcommittees of the Reliability Planning Committee formed on an ad hoc basis to address planning issues. Stakeholders are also afforded the opportunity to comment on draft transmission plans and may resort to the dispute resolution process contained in the OATT to resolve disagreements over transmission plans.

Some intervenors raise a concern that GridSouth will not be able to reject a high cost transmission plan in favor of a low cost plan because of language in section 1.4 of the Planning Protocol that confines GridSouth's ability to reject proposed transmission plans. The language pointed to indicates that GridSouth can withhold authorization of a transmission owner's transmission plan "only in the event that studies determine that such facilities will have a detrimental effect on grid reliability or will have an adverse impact which exceeds the benefits produced by the planned facilities." We agree with the intervenors that the referenced language unduly limits the decisional authority of GridSouth over the transmission planning process. While individual transmission owners

⁷³Order No. 2000 at 31,163-66; Order No. 2000-A at 31,381-82.

may serve as advisors to GridSouth, they should not be able to dictate transmission plans. The final decisions for all transmission planning and expansion must reside with GridSouth alone. The GridSouth Applicants must delete the referenced sentence from section 1.4 of Planning Protocol in the OATT.

A number of intervenors object to section 3.1 of the Planning Protocol which states that "Transmission owners will continue to be responsible for planning their systems to serve their native load customers." Joint Protestors argue that one portion of an integrated transmission network cannot be planned by GridSouth and other portions planned by the transmission owners. We are also concerned with potential discrimination by transmission owners acting in their self-interest (as well as possible conflicts that could may arise) when different transmission entities that also own generation plan separate portions of the integrated transmission grid. Order No. 2000 requires that the RTO have ultimate responsibility for transmission planning within its region.⁷⁴ While we are mindful of the obligation transmission owners have to serve their native load, a primary purpose for establishing RTOs is to have all regional transmission facilities placed within the control of an RTO, including the planning and expansion of the grid. Transmission plans for native load must be an integral part of the regional plan to eliminate the possibility for undue discrimination and potential conflicts that may reduce reliability. Accordingly, we will require the GridSouth Applicants to modify the Planning Protocol in the OATT by deleting the sentence in section 3.1 referenced above and further clarifying that all transmission planning whether to serve native load or other load will be under the authority of GridSouth. Of course, GridSouth should accommodate native load planning and work in concert with the transmission owners, as well as state regulatory commissions, as Order No. 2000 dictates.

The GridSouth Applicants acknowledge that the Planning Protocol does not include procedures applicable to requests for connection of new generation to the transmission system and commit to providing such procedures. The Applicants should include the generation interconnection procedures either in the supplemental rate filing or as part of the compliance filing that Applicants must submit by May 14, 2001. Intervenors will have an opportunity to review and comment upon the generation interconnection procedures and policies after they are filed. In addition, the GridSouth Applicants clarify that GridSouth, and not the transmission owners, will have approval authority over new generator interconnections. With this clarification, we are satisfied that GridSouth has sufficient decisional authority. We do not believe it necessary to establish a regional non-profit umbrella organization that would have authority over generator interconnections.

⁷⁴Order No. 2000 at 31,380-381.

Order No. 2000 recognized that transmission planning is complex and requires the coordination among multiple parties. As a result, Order No. 2000 allows a three-year implementation period. As required by Order No. 2000, GridSouth must file no later than the initial date of operation, a plan specifying milestones that will ensure implementation of a transmission planning process that (1) encourages market-motivated actions for preventing and relieving congestion that establish clear rights to transmission facilities and provide accurate price signals and (2) accommodates efforts by state commissions to create multi-state agreements to review and approve new transmission facilities, coordinated with the programs of regional transmission groups.

With respect to provisions in the TOA that may impede more efficient transmission expansion, we agree that an existing TOA participant should not have the right of first refusal in regard to GridSouth expansion in the participant's service territory, pursuant to section 2.08. We agree that GridSouth should undertake competitive solicitation for transmission expansion and upgrades and consider the cost, quality and timing aspects of proposals submitted by all interested entities. In addition, third parties should be allowed to build merchant transmission facilities outside the context of the GridSouth regional plan, subject to GridSouth's review to ensure that such facilities meet the technical requirements and do not reduce the overall transfer capability of the GridSouth grid.⁷⁵ GridSouth Applicants should revise their RTO proposal accordingly, consistent with our earlier discussion of GridSouth's transmission planning and expansion responsibilities.

With respect to concerns raised by protestors about public power and cooperatives being excluded from the GridSouth formative process, as noted previously, we fully expect the Applicants to work with any public power and cooperative transmission systems that may want to join GridSouth, consistent with Applicant's stated commitment to do so.

RTO Function No. 8: Interregional Coordination

The RTO must ensure the integration of reliability practices within an interconnection and market interface practices among regions.

1. The GridSouth Applicants' Proposal

The Applicants state that they will work with neighboring RTOs to share information, develop common practices and coordinate operations. They state that they have begun meeting with other RTOs and public utilities and will continue to do so through the formation of GridSouth and afterward. According to the Applicants, discussions have

⁷⁵See ISO New England, et al., 91 FERC ¶ 61,311 at 62,075-76 (2000).

focused on rate discounting, inter-RTO planning, control area inadvertent settlement, and inter-RTO market monitoring.

2. Intervenors' Comments

A number of intervenors state that the Applicant's vague agreement to talk with other RTOs is inadequate and provides no date certain for implementation of an interregional coordination arrangement. Industrial Consumers contend that the Commission should convene a technical conference to develop a specific template and timetable for resolution of seams issues among RTOs that RTOs would be required to adopt or show cause why they should not be merged. EPSA suggests that the Commission assume a more pro-active role in creating a neutral, cross-RTO market structure to govern market policy and mitigate seams issues across the region covered by GridFlorida, Southern and GridSouth and asks that the Commission direct the parties to use the resources of its Alternative Dispute Resolution division. SMI Steel and Williams request that the Commission direct the development of a coherent and uniform plan for interregional coordination that addresses reliability and market issues, which SMI Steel states should include waiver of access charges for transmission that crosses RTO boundaries. Calpine asserts that more information and enforcement provisions must be included in the LLC and operating agreements to ensure proper interregional planning.

Alabama Municipal requests that the Commission order the GridSouth participants and the participants in the proposed adjacent Southern RTO and Florida RTO to undertake an open, collaborative process to establish an independent "seams" administration organization in the form of a non-profit ISO with authority over all interface issues and to establish uniform standards for planning and pricing. Alabama Municipal states that the seams administrator should be established within twelve months of the start of GridSouth operations. Alabama Municipal intends that the seams administrator would evolve into a single Southeast-wide ISO within five years of initial RTO operations.

Dynegy asserts that one of the most important impediments to the creation of regional markets is the lack of consistency of rules among transmission owners and regions. Dynegy urges the Commission to be actively involved in directing the current industry interregional coordination discussions. Dynegy recommends a 10-step plan for Commission action which includes, among other things, developing a list of interregional issues to be addressed, recognize that RTOs will not solve the problems without Commission collaboration and establish deadlines and milestones for fixing the problems.

Santee Cooper requests that the Applicants be directed to engage in meaningful discussions with Santee Cooper for the purpose of modifying their organic documents to permit the negotiation and execution of a coordination/seams agreement once the

GridSouth RTO has formed. According to Santee Cooper, the Applicants have thus far refused to engage in such discussions. Santee Cooper's integrated transmission system is contiguous to and integrated with GridSouth and covers 75 percent of the geographic area of South Carolina and 40 percent of the transmission facilities in the state. Santee Cooper contends that the region would benefit from its coordination with GridSouth on tariff administration and design, congestion management, parallel path resolution, OASIS operation and ATC calculations and elimination of pancaked rates. ElectriCities also complain that the Applicants offer no seams solutions, either with Dominion or with Santee Cooper.

3. The GridSouth Applicants' Response

The Applicants state that they are committed to actively participating in inter-regional seams discussions to incrementally resolve the operational and rate issues facing RTOs. They maintain that a seams administrator is not necessary because it is already working with other RTO proponents in Inter-RTO Seams Collaborative Team meetings to address issues at the seams between RTOs. According to the Applicants, the group is working on a variety of issues, including one stop shopping, long-term planning, rate reciprocity, inadvertent vs. energy imbalance, congestion management and market monitoring. The workshops have produced two works in progress – a one stop shopping strawman and a long-term planning strawman.

4. Discussion

The interregional coordination function of Order No. 2000 has two aspects: the integration of reliability practices and the integration of market interface practices.⁷⁶ As stated in Order No. 2000, the integration of reliability practices involves procedures for coordination of reliability practices and sharing of reliability data among regions, including procedures that address parallel path flows, ancillary service standards and transmission loading relief procedures. The integration of market interface practices involves developing some level of standardization of market standards and practices, including the coordination and sharing of data necessary for calculation of TTC and ATC, transmission reservation practices, scheduling practices and congestion management procedures.

No intervenor questions the efforts of the GridSouth Applicants to integrate reliability practices. However, several intervenors argue that the Applicants have not taken adequate steps to ensure the integration of market interface practices. Although several

⁷⁶Order No. 2000 at 31,167-68.

intervenors acknowledge that the Applicants have initiated discussions with other transmission entities about an interregional coordination arrangement, they complain that the Applicants offer few details of ongoing discussions, no mechanisms to coordinate activities with other regions and no time frame for implementation of such mechanisms. Order No. 2000 requires an RTO to develop mechanisms to coordinate its activities with other regions and, if such coordination mechanisms cannot be set forth in its application filing, to propose reporting requirements, including a schedule for providing follow-up details as to how it is meeting the coordination requirements.

The GridSouth Applicants have not yet developed a mechanism that integrates the transmission activities of the region. We recognize that developing an interregional coordination arrangement is a complex and lengthy undertaking involving diverse groups and that the Applicants have begun such efforts in their region. Although the Applicants did report upon their ongoing coordination discussions, they did not provide a reporting schedule. By May 14, 2001, the GridSouth Applicants must provide a schedule for the submission of future reports addressing their progress in resolving inter-regional problems and problems at the seams between GridSouth and other transmission entities within the Southeast region.

We decline to establish a seams coordinator as requested by Alabama Municipal. The GridSouth Applicants have already engaged in discussions to resolve issues regarding seams among transmission entities in the region. We do note, however, that the list of entities mentioned by the GridSouth Applicants as comprising the Inter-RTO Seams Collaborative Team does not include the Southern Companies or Santee Cooper. The Applicants state that while they have discussed with the Southern Companies ways to coordinate and complement to facilitate elimination of seams issues, a requirement that they coordinate their proposals at this time would delay implementation of GridSouth. Santee Cooper indicates that the Applicants have not engaged in discussions with Santee Cooper to form a coordination/seams agreement. The Applicants should provide a report by May 14, 2001 on any discussions on these issues that have taken place between the Applicants and Southern and any other transmission owners.

Santee Cooper, the Southern Companies, the Tennessee Valley Authority and the currently proposed Alliance RTO each have extensive transmission systems contiguous to GridSouth facilities. To ensure a reliable bulk power transmission system and competitive markets in the Southeast, it is necessary that GridSouth coordinate transmission practices with these entities. Therefore, the GridSouth Applicants must include Santee Cooper, the Southern Companies and other neighboring transmission entities in discussions to coordinate and integrate transmission activities. The Applicants should provide a report on the progress of these discussions by May 14, 2001. While we do not want to cause an unnecessary delay in the commencement of GridSouth's operations, interregional

coordination discussions are appropriate now that the GridSouth Applicants have filed their proposal and received provisional Commission approval.

Several Intervenors request that the Commission design a specific or uniform template for interregional coordination or otherwise be actively involved in directing and governing interregional coordination discussions. EPSA requests that the Commission direct the parties to use the resources of its Dispute Resolution Service (DRS) division. We decline at this time to dictate a uniform or "one-size-fits-all" approach. While some aspects of EPSA's request may be worthy of consideration, this docket is the wrong forum for dealing with these issues. It is also premature at this stage to involve the Commission's dispute resolution resources. If discussions concerning appropriate integration of reliability and market interface practices break down in the future, parties can request DRS assistance.

D. Open Architecture

Any proposal to participate in an RTO must not contain any provision that would limit the capability of the RTO to evolve in ways that would improve its efficiency, consistent with the required characteristics and required functions for an RTO.

1. The GridSouth Applicants' Proposal

The Applicants represent that neither the LLC Agreement, the TOA, nor any of the other GridSouth governing agreements or protocols contains any limitations on the capability of the GridSouth RTO to evolve in ways that would improve its efficiency, consistent with the required characteristics and required functions for an RTO. The governing documents were prepared with the recognition of the continuing changes in the electric industry and to enable GridSouth to be responsive to those changes. GridSouth has an open door policy for any public power transmission system that wants to join GridSouth either as a participant that transfers functional control over its transmission assets to GridSouth RTO or as a transmission customer. During an Open Window period, running from October 16, 2000 until start-up (the independence date), any transmission-owning utility, public power or investor-owned utility that is electrically interconnected with GridSouth Applicants and whose transmission facilities will be integrated into the plans or operations of GridSouth for service under the Tariff may become an additional participant under the TOA.⁷⁷ To become an additional member of the LLC, as well, prior

⁷⁷Transmittal letter at pages 69-70. After the Open Window Period, any other transmission-owning utility may become a participant by entering into the TOA, subject to
(continued...)

to the independence date, a transmission-owning utility must contractually agree to pay its pro rata share of start-up costs and commit to executing the TOA by the independence date subject to the terms and conditions that applied to the initial members. After the Open Window, such additional member must negotiate additional terms and conditions of its participation in the TOA.

2. Intervenors' Comments

Protestors variously argue that Applicants' proposal fails to comport with the expansion and efficiency requirements of the open architecture standard under Order No. 2000.⁷⁸ They criticize what they see as unnecessary or unreasonably restrictive provisions in the LLC Agreement and the TOA that would put new entities that might otherwise join GridSouth on an unequal footing with the Initial Members. Protestors also complain that the Applicants should, prior to filing, have worked more closely with public power and cooperatives to overcome the legal impediments that prevent their full participation in the GridSouth RTO.

In particular, protestors challenge certain provisions of the LLC Agreement as unfairly penalizing new members. They question the section 4.2(c) and section 4.4(a)(i) requirements for an additional member joining during the Open Window to pay a flat 10% premium for an interest in the LLC and to also extend a line of credit to the LLC in the amount of 233.33% of the amount it paid for its interest.⁷⁹ They further object to the section 4.4(a)(ii) requirement for an additional member joining in the LLC Agreement,

⁷⁷(...continued)

its terms and conditions and the negotiation of terms mutually acceptable to the transmission-owning utility and GridSouth. Section 2.12(a) of the TOA.

⁷⁸E.g., Santee Cooper, Joint Protestors, Dynegy and CUCA.

⁷⁹The 233.33% line of credit requirement is said to compare unfavorably to only a 70% line of credit requirement applicable to the Applicants per Section 4.2(b). For the Applicants, Section 4.2(b) of the LLC Agreement reads in relevant part: "... each Initial Member shall also extend credit to the Company the sum in the form of cash ... in exchange for a convertible note of the Company ... which sum shall be ... (70%) of such Member's Pro Rata Share of the total Start-Up Funds. ..." For an Additional Participant under the TOA that elects to become an Additional Member of the LLC, Section 4.2(c) of the LLC Agreement reads in relevant part: "Each Additional Participant purchasing such Interests shall ... extend credit to the Company in form of cash in exchange for a Convertible Note in a principal amount equal to ... (233.33%) of the aggregate amount paid for Interests by such Additional Member."

after the Open Window, to pay for its interest a price at least 10% higher than that paid by initial members but also subject to other terms the GridSouth Board may negotiate pursuant to the section 2.12 of the TOA.

Protestors also claim that certain provisions of the LLC Agreement put new members on an unequal footing with the GridSouth Applicants. They challenge the section 5 of Schedule E provision that confers on the initial members the right to select the initial GridSouth Board. They also question the section 9.5 provision that confers on each initial member that owns a 5% or greater interest in the LLC the right to trigger an IPO of equity securities after the tenth anniversary of the independence date.

In addition, protestors claim that other provisions of the LLC Agreement limit the universe of possible members in the LLC. They object to the section 4.4(b) provision that permits existing Class C interest holders to purchase the Class C interests that a new TOA participant is otherwise entitled to acquire during the Open Window but declines pursuant to section 4.4(a)(i). They also challenge the section 4.4(c) provision that confers the right of first refusal on existing Class A and C interest holders to purchase any new interests that the GridSouth Board may wish to offer pursuant to section 4.4(c) by means other than through an IPO.

Protestors assert that GridSouth RTO expansion may also be impeded by the section 6.13(b)(i) and (iv) requirements for an affirmative vote of a super majority of any combination of LLC Members holding Class A and C interests whose aggregate percentage interests are greater than 85%, on board actions that pertain to acquiring substantially all of the capital stock or other equity interests of another entity through merger or through consolidation into another limited liability company.

Finally, protestors claim that the GridSouth organization needs to have embedded within it a means to work with public power and cooperatives to overcome their special income tax and other legal obstacles to full participation in the GridSouth RTO. They also claim that the Applicants failed to conduct meaningful pre-filing discussion with public power and cooperative transmission owners regarding their participation, as required by Order No. 2000. Protestors call upon the Commission to order the Applicants to engage in such meaningful discussions to arrive at an RTO proposal that recognizes and reasonably accounts for the differences and needs of these entities in a manner consistent with Order No. 2000.

3. The GridSouth Applicants' Response

The Applicants respond that the additional member provisions of the LLC Agreement and the additional participant provisions of the TOA are designed to encourage

the expansion of GridSouth. They claim that the premium paid for interests in the LLC applicable to additional members is customary and reasonable and that it merely allows the founders of GridSouth to receive compensation for their start-up efforts. Also, the effect of the 233% credit line requirement figure is not to impose any additional obligations on new members that are not also imposed on the GridSouth Applicants, since all members, at bottom, are simply required to extend \$70.00 of credit for every \$30.00 of equity each purchases. Applicants further respond that the only limitation on the GridSouth Board's ability to negotiate additional terms and conditions of new members who join in the LLC Agreement after the Open Window is that the terms must include a founders' premium of at least 10%.

Applicants note that public power and other entities would not necessarily have to purchase LLC equity interests in order to transfer functional control of their transmission to GridSouth but merely need to execute the TOA. Finally, while certain statutory provisions may preclude a public power entity from joining a for-profit RTO, the Applicants assert that it would not be fair to require Applicants to abandon their desire for a for-profit RTO simply because of statutory restrictions applicable to other entities over which Applicants have no control.

4. Discussion

We believe that the Applicants should receive a return of and on prudently incurred start-up costs. However, until such time as GridSouth makes an IPO, we find that setting, in advance, a fixed or minimum premium for an additional member to pay for its acquisition of an interest in the LLC may unnecessarily serve to deter expansion of the GridSouth RTO. Instead, we find that the GridSouth Board and interested parties should be free to negotiate the proper level of any premium, based on their assessments of their respective corporate business needs at that time. GridSouth should revise its corporate documents, accordingly.

With regard to the line of credit requirement for additional members of the LLC, the Applicants have explained that their intention is to require additional members to bear the same line-of-credit obligations as the initial members. Accordingly, such intent should be specifically incorporated in the relevant provisions of the LLC Agreement.

With regard to issues raised concerning the right of the Applicants to select the initial GridSouth Board and initiate an IPO, the super majority rights of members of the LLC to affirm merger initiatives of the Board, and certain rights of first refusal held by existing Class A and C interest holders to acquire additional interests in the LLC, these have been addressed in the Independence section of this order.

The Commission orders:

(A) The motion to intervene out of time in this proceeding is hereby granted, as discussed in the body of this order.

(B) GridSouth Applicants' answer to comments and protests is hereby granted, as discussed in the body of this order.

(C) The motions for summary disposition, and requests for an evidentiary hearing are hereby denied, as discussed in the body of this order.

(D) EPMI's motion requesting that the Commission condition market rate authority on RTO participation is hereby dismissed, as discussed in the body of this order.

(E) The joint Motion to Lodge filed by Electricities, New Horizon and Central is hereby denied, as discussed in the body of this order.

(F) GridSouth Applicants' compliance filing is hereby provisionally accepted as discussed in the body of this order, and GridSouth Applicants are hereby directed to submit within sixty days of the issuance of this order revisions to the GridSouth Open Access Transmission Tariff, GridSouth Transmission Operating Agreement and Limited Liability Agreement of GridSouth Transco, LLC, as discussed in the body of this order.

(G) GridSouth Applicants are hereby directed to file their actual rates no later than 60 days prior to the commencement of operations.

(H) GridSouth Applicants are hereby directed to file a status report regarding scope and configuration by May 14, 2001, as discussed in the body of this order.

(I) GridSouth Applicants are hereby directed to file a status report regarding interregional coordination discussions with neighboring transmission entities by May 14, 2001, from the date of this order, as discussed in the body of this order.

(J) GridSouth Applicants are hereby directed to file a schedule for future progress reports on interregional coordination discussions and efforts within May 14, 2001, from the date of this order, as discussed in the body of this order.

(K) GridSouth Applicants are hereby directed to file a plan with specified milestones no later than the date of operation that ensures compliance with the transmission planning and expansion function requirements, as discussed in the body of this order.

(L) Commission staff is hereby directed to convene a conference with GridSouth and Santee Cooper within 15 days of the date of this order, and Commission staff is further directed to submit a report on the outcome of the conference within 15 days after that, as discussed in the body of this order.

By the Commission. Commissioner Massey concurred with a separate statement attached.

(S E A L)

David P. Boergers,
Secretary.

APPENDIX

Intervenors

Alabama Municipal Electric Authority (Alabama Municipal)#
 American Forest & Paper Association (AF&PA)#
 Ameristeel Corporation
 Automated Power Exchange, Inc. (APX)#
 Calpine Eastern (Calpine)#
 Carolina Industrial Group for Fair Utility Rates (CIGFUR)^
 Carolina Utility Customers Association, Inc. (CUCA)#
 Central Electric Power Cooperative, Inc. (Central)#
 Coastal Merchant Energy, L.P.
 Constellation Power Source, Inc. (CPS)
 Coral Power, L.L.C. (Coral)#
 Dynegy Inc.#
 Electric Power Research Institute (EPRI)**
 Electric Power Supply Association (EPSA)#
 ElectriCities of North Carolina, Inc., Piedmont Municipal Power Agency, and the Cities of Orangeburg and Seneca, SC (ElectriCities)#
 Enron Power Marketing, Inc.#
 Entergy Power Generation Corporation
 Georgia Transmission Corporation
 Industrial Consumers (Electricity Consumers Council, American Iron and Steel Institute, American Chemistry Council and American Forest and Paper Association)**
 Memphis Light, Gas and Water Division
 Midwest Independent Transmission System Operator, Inc.
 Morgan Stanley Capital Group, Inc.
 Municipal Electric Authority of Georgia
 National Rural Electric Cooperative Assn.
 NC and SC Municipalities; Municipalities of Black Creek, NC; Dallas, NC; Due West, NC; Forest City, NC; Lucama, NC; Prosperity, SC; Sharpsburg, NC; and Stantonsburg, NC (NC and SC Municipalities)#
 New Horizon Electric Cooperative, Inc. (New Horizon)#
 North Carolina Attorney General (NC Attorney General)#
 North Carolina Electric Membership Corporation (NCEMC)#
 North Carolina Utilities Commission*
 Nucor Steel-South Carolina, a division of Nucor Corporation
 Oglethorpe Power Corporation
 PG&E National Energy Group, Inc.
 Reliant Energy Power Generation, Inc. (Reliant)#
 Shell Energy Services Company, L.L.C.

SMI Steel-South Carolina, a division of Commercial Metals Company (SMI Steel)#
South Carolina Consumer Advocate (SC Consumer Advocate)#
The South Carolina Public Service Authority (Santee Cooper)#
Southeastern Power Administration
Southern Natural Gas Company#
Tenaska, Inc.
Tennessee Valley Public Power Association (TVPPA)
Tractebel Energy Marketing, Inc. (Tractebel)#
The Williams Companies, Inc. (Williams)#

* Notice of Intervention
** Comment without Intervention
Comment/Protest (with Intervention)
^ Untimely intervention

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Carolina Power & Light Company
Duke Energy Corporation
South Carolina Electric & Gas Company
GridSouth Transco, LLC

Docket No. RT01-74-000

(Issued March 14, 2001)

MASSEY, Commissioner, *concurring*:

With this order and the order we issue today on the Southern Company RTO proposal,¹ the Commission begins the process of getting RTOs formed in the southeastern United States. Both orders recognize that more work is to be done. I would have preferred that our orders more aggressively prod the applicants toward a single southeastern RTO.

I would have preferred that we order both sets of applicants to participate in a formal proceeding overseen by a Commission ALJ, the object of which would be to form a single RTO for the southeastern U.S. My reasoning for doing so differs for each applicant, but the bottom line is that they need each other.

The proposed GridSouth RTO is lacking in scope. The order recognizes this in requiring a staff conference to address the inclusion of Santee Cooper and in its exhortation for GridSouth to talk to its neighbors about RTO formation, and report back to us. While these are both positive steps, I would require more. While including Santee Cooper and other public power entities in RTOs is important, Grid South's scope is still too small, comprising just two states and four utilities, even if Santee Cooper is included. GridSouth needs to get substantially bigger, and including Southern Companies would give it the scope it needs. Moreover, I am skeptical that mere status reports will get the job done. Withholding RTO status from GridSouth and requiring both GridSouth and Southern Companies to participate in a formal ALJ proceeding aimed at a single RTO is a more promising approach.

Today's order makes a number of important policy calls on independence, planning and other areas. I would like to highlight just a few. The order rejects the proposed unconditioned right of passive owners to veto mergers or consolidations with RTOs, and instead requires a passive owner to come to the Commission to exercise that

¹Southern Company Services, Docket No. RT01-77.

veto right and demonstrate that a proposed merger would adversely impact the integrity of its investment in the transco.

This order also finds that the current transmission owners have far too much involvement in the initial selection of the board of directors and requires that stakeholders have an equal voice in the selection process. This is consistent with the general approach we approved for initial board selection in the GridFlorida transco and I am pleased that we are directing a more equitable approach in this case. The independence of the initial board must be above reproach.

Finally, the order holds the door open for future Commission involvement in facilitating standard reliability and market interface procedures. The lack of standard procedures is regarded as an increasingly serious impediment to trade by many market participants and may lead to unnecessary expenditures on software that may become unusable if and when standardization occurs later. Most interface procedures are technical in nature and not subject to regional idiosyncracies. Thus, I believe that it is appropriate for the Commission to begin an initiative to develop standard interface procedures where possible. In the mean time, I support the order's suggestion that parties bring any tough issues regarding such standardization to the Commission's Dispute Resolution Service.

For the reasons discussed above, I concur with today's order.

William L. Massey
Commissioner